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of Hanbury Hall in the County of Worcester Esq.^r

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G. Kneller sculptor 1735

CASES

Argued and Adjudged in the

High Court of Chancery.

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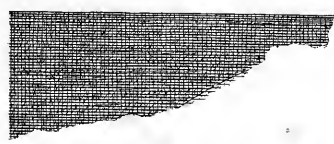
VOL. I.

In the *SAVOY*:

Printed by E. and R. NUTT and R. GOSLING, (Assigns of *Edw. Sayer*, Esq;) for **J. Conson** at *Shakespear's Head* in the *Strand*,
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To the Right Honourable

P E T E R

Lord K I N G,

Baron of OCKHAM,

Lord HIGH CHANCELLOR of

GREAT BRITAIN.

HAVING in Obedience to an
Order of that Court, where
your *Lordship* now presides, supervised
and fitted for the Press one Volume of
a Mr.

The DEDICATION.

Mr. *Vernon's* Reports, we beg leave to lay it before your Lordship; And this we the rather presume to do, that by prefixing your Lordship's Name to this *Work*, we may do Justice to the Memory of that *Great Man*, whose Abilities in his Profession were so well known to your Lordship.

These *Reports*, how useful soever they may be in themselves, would have been much more valuable, if they had been brought down to your *Lordship's* Time, and had taken in the Decrees, which are made by your *Lordship* with such distinguishing Judgment, and so impartial a Regard to the Rules of Justice and right Reason.

His

The DEDICATION.

His Majesty in intrusting your *Lordship* with the Custody of the *Great Seal*, has no less gratified the Desires of his People, than given a convincing Proof, (if any can be wanting after what his *Majesty* has already done) how much he consults the publick Welfare: And when it is considered how agreeable his *Majesty's* Choice of a *Chancellor* has been to the whole Nation; your Lordship, we hope, will permit us to say, there must be something very *uncommon* in a Person, in whom the differing Sentiments of all Parties so intirely unite.

May your Lordship long enjoy the *Honours*, which you have so deservedly acquired, and may those *Labours*,

The DEDICATION.

which are sustained by your Lordship with such unwearied *Patience* for the publick Good, be attended with Success fuitable to the *Zeal*, with which they are undertaken.

We are

Your Lordship's

most Dutiful, and

most Obedient Servants,

Wm-Peere Williams.

Wm. Melmoth.

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D E

Termino S. Hillarii,

1680.

IN CURIA CANCELLARIÆ.

Lord Chancellor
Nottingham
11 Febr. 1680.

Tho. Tiffin, Brother and Heir } Plaintiff.
of *Robert Tiffin*,

Case 1.

Mary Tiffin, Executrix of *Robert Tiffin*, } Defendants.
Crick and *Groome*,



ROBERT *Tiffin* purchased the Lands in question, and took the Fee in his own Name, and an Assignment of the Mortgage term for Years in the Names of the Defendants *Crick* and *Groome* in trust, and made his Wife the Defendant *Mary* Executrix. The Plaintiff as Heir brought

this Bill for an Assignment of the Term; for that it was to attend the Inheritance.

² Ch. Rep. 49.
55.

A Man purchases Land and takes the Fee in his own Name, and an Assignment of a Term in a Trustee's Name; the Term shall attend the Inheritance, tho' not said in the Assignment it should do so.

The Defendant the Executrix insisted, there was no mention in the Assignment, that the Term was to attend the Inheritance; and that it was a Term in *gross*, and ought to be enjoyed as a Chattle; and was Assetts.

B

Lord

The Custom
of London shall
not prevent the
attendance of a
Term on the
Inheritance
*V. post. Dowse
vers. Percival.
Case 92.*

Lord Chancellor, A Term in the Owner is Affetts at Law, but a Term in Trust is not to be made Affetts in Equity; and it would be dangerous to Purchasers to make it so: and cited the Case of *Greene* and *Lambert*, where it was adjudged the Custom of *London* should not prevent the attendance of a Lease on the Inheritance: and Decreed the Trustees to assign the Term to attend the Inheritance.

D E

Termino Paschæ,

*Ann' Regn' Car' II. Regis 33, Annoque
Dom. 1681.*

IN CURIA CANCELLARIÆ.

Winn versus Littleton.

Café 2.

WINN being seized of divers Lands in Fee in the several Counties of *G. M. D.* within the Dominion of *Wales*; and having likewise divers other Lands in other Counties within the Dominion of *Wales* made over to him in Mortgage, he by his last Will devises all his Lands in the Counties of *G. M.* and *D.* to Sir *John Winn* and his Heirs, and devises a Rent-Charge of 80 *l. per Annum*, issuing out of the same Lands, and then bequeaths divers Legacies to the Value of 1500 *l.* And then comes this Clause in his Will, viz. *The Residue of all my Personal Estate I give to my loving*——Executor, (leaving a Blank for the Name of his Executor) And upon this Will the Question was, Whether the Lands he had in Mortgage should pass to Sir *John Winn* by the Devise of all his Lands; or whether the Lady *Littleton*, who was next of Kin, and was his Administratrix, should have them?

2 Ch. Rep. 51.
A Man seized in Fee of divers Lands, and having also Lands mortgaged to him, devises all his Lands to A. and his Heirs.

Upon hearing Counsel, it was decreed *per Lord Chancellor* for the Administratrix. And in this Café it was declared

clared by the Lord *Chancellor*, that always, when a Mortgagee dies, and makes no Devise of the Lands he has in Mortgage, they shall go to the Executor. And in *London* there is this special Custom, That Lands in Mortgage are always reckon'd the Personal Estate of the Mortgagee, he being a Citizen. And as to the Principal Case, it was observed,

First, That the Testator doth make special Mention of the three Counties in which his own Lands of Inheritance lay, but not of the Counties in which the mortgaged Lands lay, but adds a General Clause *currente calamo, or elsewhere within the Dominion of Wales*; and having thus descended to Particulars, he has thereby so limited and circumscribed his Intention, that the General *Fortuitous* Clause cannot open or enlarge it, for that is but in the nature of an *Et cetera*, and may serve to fetch in small Parcels of Land, that were the Testator's own Inheritance, that lie out of the said three Counties, if any such there are (as in Truth in this Case there were) but shall never reach the mortgaged Lands, which are of a different Nature; and the rather, for that in this Case the mortgaged Lands were of great Value, and equivalent, if not exceeding, the Value of his other Lands, and therefore must not pass by such a General Clause, as if they were only Skirts and Members of the other Lands.

Secondly, For that he by his Will hath charged the Lands, that pass by this Devise (*of all his Lands*) with a Rent-Charge for Life, and no Man can be thought so improvident as to grant a Rent, for so great an Estate and of so long a Continuance as for Life, out of Lands which are every Day redeemable; altho' it was answered, that when the Mortgage should be redeemed, every one should have Part of the Money *pro Rata* for their several Interests.

Thirdly, Suppose the Devise had been of all his Lands in the said three Counties, as in this Case it was, and then without more he had said, that the rest of his Personal
 2
 Estate

Estate should go to his Executor, there perhaps the mortgaged Lands should pass, for otherwise there would be nothing to answer and make Sense of that Clause, *And the Residue of my Personal Estate*, &c. for that doth imply, that he had already devised some Part of his Personal Estate, or at least it shews, that he meant Part of it should have passed: But as this Case is, those Words, *Residue of his Personal Estate*, are without any such Construction, well understood and effectually answered; for before that Clause in his Will he had devised divers Legacies, that in the Whole did amount unto 1500 *l.* And forasmuch as the Administratrix in this Case was nearest of Blood to the Testator, and therefore as well intitled to the Equity of this Court, as the Devisee, who was more remote in Blood, although he was of the same Name, and this being a Case purely of Construction, for that these mortgaged Lands cannot pass to the one or other of them by the Words of the Will; and so there is Construction against Construction, and not a Construction against the Letter of the Will. Hereupon it was decreed that the Administratrix should have the said mortgaged Lands.

The Earl of *Kingston* versus the Lady
Elizabeth Pierepont.

Case 3.

THE Case was thus: *Gearvase Pierepont* devises by his Will 10000 *l.* to procure by all lawful Means a Dukedom to the Head of his Family, so that it be within a Year after his Decease: And a Bill was exhibited to have the Mony applied accordingly; but upon a Demurrer, it was adjudged against the Plaintiff, as well, for that it is illegal to acquire Honour for Money, as also for that the Bill was not exhibited within due Time, so as to attach the Mony in Equity within the Year.

10000 *l.* left by Will to procure a Dukedom to the Head of the Family.

Case 4.

Love versus

A Freeman of London settles a Jointure before Marriage, in lieu of his Wife's Customary Share of his Personal Estate, and then by Will gives two Thirds of his Personal Estate to his Daughters, and one Third to his Sons

In what Manner the Division shall be made.

A Citizen of *London* being possessed of a Personal Estate to the Value of 18000*l.* and having made a competent Jointure to his Wife on his Marriage, it was agreed, that he might dispose of two Thirds of his Personal Estate by his Will, *viz.* One third Part, which would have belonged unto his Wife, had he not made a Settlement upon his Marriage in lieu thereof, by which Means her customary Part comes to be at his Disposal; and one other third Part, which is the Legatory Part, which every Citizen may dispose of by his Will; and having two Sons and two Daughters, he makes his Will, and by it devises two Thirds of his whole Estate to his Daughters, and one Third to his Sons: Hereupon the Chamber of *London* would have distributed his Estate in this Manner: First, To make an equal Division of the Customary Part, *viz.* of 6000*l.* amongst all the four Children, which was 1500*l.* a-piece, and then allot two Thirds of the Residue to the Daughters, and one Third to the Sons; so that by this Division each Daughter should have only 5500*l.* and each Brother should have 3500*l.* But the Lord *Chancellor* declared, that the Intent of the Testator did to him plainly appear to be, that his Daughters should have two entire Thirds of his whole Estate, which is 6000*l.* a-piece; and it was decreed accordingly.

D E

Term. S. Trinitatis,

33 Car' II. Regis.

IN CURIA CANCELLARIÆ.

Sir Edward Turner's Case.

Case 5.

Memorandum, That about *Michaelmas* last it was Adjudged in an Appeal in the House of Lords, in the Case of Sir Edward Turner, That a Term being assigned in Trust for a Feme by her former Husband, and she afterwards intermarrying with the late Lord Chief Baron Turner, who aliened the Term, That the same was well passed away, and that the Husband might dispose thereof; and my Lord Chancellor's Decree was thereupon reversed: But it was agreed, that where a Term is assigned in Trust for a Feme by the Privy and Consent of her Husband, there without doubt the Husband cannot intermeddle or dispose of it.

A Feme possessed of a trust of a Term, marries. The Husband may dispose of it.

Otherwise, if the Term is Assigned in trust for the Wife with the privy of the Husband

V. post. Pitt. versus Hunt. Case 10.

Newcomb versus Bonham.

Case 6.

A Man being seized of Lands in Fee, makes an Absolute Conveyance thereof to the Defendant Bonham; but by another Deed of the same Date the Lands are made redeemable upon Payment of 1000*l.* and Interest at any time during the Life of the Grantor; and in case the Lands should not be redeemed in his Life-time, then he Covenants that the same should never be redeemed.

2 Ch. Rep. 58. & 159.

A Mortgage is made redeemable during the Life of the Mortgagor only; yet his Heirs shall redeem.

And in this ed. The Grantor dies before the Lands are redeemed, and his Heir at Law exhibits a Bill to have a Redemption.
 Case the Mortgagor may be foreclosed in his own Life-time.

But *Vid. post.*
 Case 227. where this Decree was reversed.

It was in Proof in the Cause, that the Mortgagor had a Kindness for the Mortgagee, as being his near Relation, and did intend him the Lands after his Death, and that the Clause of Redemption was put in only upon the Account that the Mortgagor was then a Batchelor, and so might marry, and have Issue; but that his full Intent was, that in case he dyed without Issue the Mortgagee should have the Lands absolutely without Redemption; And also that the said one thousand Pounds was really the full Value of the Estate at the time of the Conveyance, but it afterwards happened to be a good Bargain, it being a Reversion after two Lives, and the two Lives happening to die within a short time: And it was urged that the Mortgagee run hazard enough, for that as it happened to be a good Bargain, it might have been a bad one, and yet he had no Covenant nor other Remedy to compel the Repayment of his Money, for the Mortgagor had time to redeem during Life; and suppose the Mortgagor should have lived 30 or 40 Years after the Mortgage made, and then had come to redeem, as he might have done, there had been all the Interest upon Interest thereby lost, which comes to more than the Principal.

The Lord Chancellor was of Opinion, that although the Mortgagor had time to redeem during Life, yet the Mortgagee might have compelled him to redeem, or have foreclosed him: And said that it was a General Rule, *Once a Mortgage, and always a Mortgage*; And in regard the Estate was expressly redeemable in the Mortgagor's Life-time, it must continue so afterwards, and therefore Decreed an Account and a Redemption.
 Once a Mortgage, and always a Mortgage.
 See the Case of Howard versus Harris, *post.*
 Case 31. 191.

D E

Term. S. Michaelis,

33 Car' II. 1681.

IN CURIA CANCELLARIÆ.

Prodgers verſus Phrazier.

Caſe 7.

THE King by his Letters-Patents grants to Sir *Alex-²* Ch. Rep. 70.
ander Phrazier the Cuſtody of one *Bridgett Dennis*, The Cuſtody
 an Ideot, &c. by very full words. *Habend'* to Sir *Alex-* of an Ideot
ander Phrazier, his Executors, Adminiſtrators and Affigns, cannot be gran-
 during the Ideotcy of the ſaid *Bridgett Dennis*; and now ted to a Man,
 upon the Death of Sir *Alexander Phrazier*, Mr. *Prodgers* a his Executors,
 Bedchamber-man begs the Cuſtody of the ſaid Ideot, and Adminiſtrators
 obtains Letters-Patents for the ſame. and Affigns.

But *Vid. poſt.*
Caſe 129.
 where it was
 referred to a
 Tryal at Law.

The Point in this Caſe argued by the Council was,
whether the Cuſtody of an Ideot can by Law be granted to a
Man, his Executors, Adminiſtrators, and Affigns. And, *Fiſt*,
 A Difference was taken and agreed on all Hands between
 the Caſe of an Ideot and a *Lunatick*; that in the Caſe of a
 Lunatick, it is only a Truſt in the King, and no Profit
 by Law intended him thereby; But in the Caſe of an I-
 deot it is otherwiſe; for the King by his Prerogative
 has an Interſt in the Eſtate of the Ideot, and a Right to
 the Profits thereof; and to that Purpoſe was cited the *Sta-*
tute de Prerogat' Regis: and it was urged by Mr. *Holt*, that
 where the King has a Prerogative, it is intended for the
 King's Advantage, and not for the Benefit of the Sub-

D

ject;

ject; and that the King has in this Case a Prerogative, he cited *Dame Hales's Case*, where a Man marries an Ideot, and has Issue by her, whereby he becomes Intitled unto her Estate during his Life in his own Right; yet if afterwards by Office she be found an Ideot, the King by his Prerogative shall have the Lands: And it was resembled to the Case of a *Ward*, where *Littleton's* Text is, That the Wardship of a *Tenant in Capite* shall go to the Executors; but otherwise of a Wardship in *Soccage*: and the Reason is, that in the first Case there is a Profit by Law intended to the Guardian or Committee, and an Interest vested; but in the other Case, only a Trust: and although Estates at Common Law ought to have a certain Commencement, and a certain Determination; yet there are many Interests of this Nature allowed in Law, and are called *incerta Interesse*; as where Land is extended against the Heir upon the Recognisance of his Ancestor; the Conuſee is to hold until such time as the Money shall be levied; and the Grant of the Goods of a Person outlawed is, until the Outlawry shall be reversed; and there are divers other Cases of the like Nature: and Mr. *Serjeant Maynard* put this Case, where the King grants the Custody of a Ward *quam diu in manibus nostris extiterit*, that is, until such time as Livery shall be sued. And it was said by Mr. *Wallop*, that this is only a private Minute Trust, and none of the great Trusts; as are such, as concern the Administration of Justice, or the King's Revenue: And yet in a late Case in the *Exchequer*, between *Squib* and it was adjudged, that the Office of a *Teller of the Exchequer* might be Granted to One, his Executors, Administrators and Assigns. And it was said by Sir *Francis Winnington* and Mr. *Pollexfen*, that altho' there had not been those Words in the present Grant, of *Executors, Administrators, and Assigns*, yet the King having granted his Interest *quam diu*, the said *Bridgett Dennis* should continue an Ideot, it should have gone to the Executors of the Grantee. And it was observed, that the *Statute of the 32 of H. 8*, concerning the *Court of Wards and Liverys*, ranks Ideots and Wards

Wards in the same degree: and likewise that in *Fitz, N. B.* 139, and 232, The Wardship of an Infant is called the Custody of an Infant, and that the Words are synonymous, the one from the *French* and the other from the *Latin*.

And by the Plaintiff's Council it was insisted, That tho' 'tis true, where there is a Profit and Interest, the same may be transferred and granted over; yet this is an Interest so linked and coupled with the Trust of the Care and Maintenance of the Idiot, which the Law reposes in the King, as in the safest Hands, that it cannot be granted over, otherwise than so as to be determinable at the King's Pleasure.

To which it was replied, That there was no Danger of a Breach of Trust, because it is for the Party's Benefit to preserve and maintain the Idiot: And whereas it was objected, That this Interest would not be Assets in the Hands of an Executor; it was replied by Mr. *Serjeant Maynard*, that that was *Petitio Principii*, if it be a Profit and an Interest, as without doubt it is, by consequence it must be Assets.

The Lord *Chancellor* said, That he did not take the Case of a *Ward* and an *Idiot* to be at all Parallel Cases; for the King had the one as a Trust, though coupled with an Interest; and the other purely as an Interest, Service, and Duty owing to him, and comes to the King in Point of Tenure: and therefore the King may grant the Custody of a Ward *cum acciderit*, but there can be no such Grant of the Custody of an Idiot; But he said, if the Emolument and Advantage, that by Law is given to the King, in Case of an Idiot, could be separated from the Trust, then clearly it might be transferr'd; But this is a Case of great Consequence and *Primæ Impressionis*, for no one can shew any such Grant from the time of the making of the *Stat' de Prerogat' Regis* until this Day: and
it

it should be well considered, what Inconveniency may arise in allowing of Grants of this Nature; For suppose the Grantee makes an Infant-Executor, or dies Intestate, what shall then become of the Custody of the Ideot? But he said there was that in this Case, that would make an End of it; For he had formerly seen the Inquisition, upon which both these Grants were founded; and it is thereby found that *Bridgett Dennis* had been an Ideot for Eight Years last past, which is utterly a void Inquisition; For an Ideot must be found to be so *a Nativitate*, otherwise it is not an Ideot, but a Lunatick only; and both the Letters-Patents, as well that to Sir *Alexander Phrazier*, as this latter to the Plaintiff *Prodgers*, being founded upon this Inquisition are both Void: And my Lady *Phrazier* had best have a Care lest she should be called to an Account for the Profits already received; and advised the Parties to consider of it, and when they came next to produce the Inquisition; And, if it could be, that they would end the Matter by Compromise.

At another Day the Case of *Vaine* and *Bier* in the *Exchequer* was cited, where it was resolved, that the Office of *Polycys of Assurance* might be granted for Years, against the Opinion in Sir *George Reynolds's* Case; and *Squib's* Case in the *Exchequer* cited, where it was resolved that the Grant of a *Teller of the Exchequer* to a Man and his Assigns was a good Grant. But the Lord *Chancellor* relied much upon it, that there never was any President of the Custody of an Ideot granted to a Man, his Executors, Administrators and Assigns, as this Case was: And he said *what never was, never ought to be*; And he said that was a good Reason given by *Littleton* on the Stat' of *Marlebridge*.

Sir Francis North, Ch. Justice of } Plaintiff. Case 8.
C. B.

William Way & al' Daughters and } Defendants. Lord Notting-
ham, 21 Junii
1681.
Coheirs of John Addington,

JOHN Addington, seized in Fee, conveys the Lands in 2 Ch. Rep. 78.
question to Trustees, in Trust that they should convey Common Re-
to such Persons and for such Estates as he should by Will *covery by cestuy*
direct; and then makes his Will, and thereby directs that *que Trust* in
the Trustees should convey to Thomas Addington his Son in Tail bars the
tail male, Remainder to Richard Addington Brother to John Entail and all
in tail male, Remainder to his own right Heirs; which the the Remainders.
Defendants were, Thomas their Brother being dead without
Issue.

Richard Addington being *Cestuy que Trust* in tail suffered a common Recovery, and devised to his Sisters Champernoon and Way to sell, to pay Debts and Legacies. They contract with the Plaintiff to sell to him by Articles; and he brings his Bill to discover Incumbrances, and what Title the Daughters and Heirs of John Addington had.

They insisted on their Remainder in Fee by their Father's Will, and Settlement; and that Richard's Recovery was void, there being no good Tenant to the Freehold; and Richard having only the Trust of an Estate tail.

For the Plaintiff it was insisted, that if such a Trust could not be barr'd, it might let in Perpetuity.

Maynard said, he thought any common Conveyance sufficient to dispose of such an Estate: and in the Case of Washborne and Downs it was taken without question, that a Recovery by *cestuy que trust* barr'd the Intail: but there being a Jointure out, it was referr'd to the now Lord Chancellor,

Chancellor, and 2000*l.* was awarded her. And the Case of *Goodrick* and *Brown* was Compounded: and it was said, there was a Difference between a Fine and Recovery; because a Fine does not bar the Remainder.

For the Defendant it was insisted, that the Reason, why a Common Recovery bars, is the Recompence in Value, which cannot be here; nor can such a Recovery be reversed for Error, as at Law. And there is the same Reason for a Fine, a Feoffment, or Bargain and Sale to do it, as a Recovery in this Case: and if this Recovery had been suffered by *Richard* in *Thomas Addington's* life, it would not have been good; and why should it be good now?

Lord Chancellor, Natural Justice is the Rule in Chancery, and not the Niceties of Law in Cases cognizable here: and there is no such Thing as an Estate tail of a Trust; but it is created by and subject to the Rules of this Court: And said, he thought a Feoffment and Bargain and Sale would work as a Fine: But it was clear, a Recovery would do it in Equity; else by Contrivance People might prevent Alienation, by placing the legal Estate in Trustees: And declared, it had been always taken here, that such a Recovery was good; and that *Bridgman* was clear of that Opinion in *Washborn* and *Downs's* Case: and *Lord Chancellor* Decreed accordingly in this Case, that the Recovery was good.

Robert Benson, Son and Heir of *Robert* his Father, and his two Sisters } Plaintiffs. Case 9.
all Infants, by *Prochein Amy*, }

Sir Henry Bellasis, and his Wife, } Defendants.
Mother of the Plaintiffs and Ad- }
ministratrix of their Father, }

July 6. *vel* 11.
1681.

ROBERT *Benson*, in Consideration of Marriage with the Defendant, the *Lady Bellasis*, before the Marriage settled a Jointure on her, in full Recompence of Dowry and of all Demands she might make to his Personal Estate by the Custom of the Province of *York* or otherwise, under this Proviso and Limitation, that if she after his Death did claim or recover any Part of his Personal Estate by the Custom or any other Means whatsoever, Then the Trustees were to be seized of the Jointure Lands and the Use thereof for 60 Years, in trust to receive the Profits to the Use of such Persons as should be damnified by her having or claiming Dower, or her Thirds, or any part of his Personal Estate, till the Persons so damnified should be reimbursed such Damnification.

Settlement made in bar of all the Wife's Demands out of the Personal Estate of her Husband by the Custom of the Province of *York* or otherwise. The Husband dies Intestate, Wife barred of her Distributive as well as Customary Part.

Robert Benson died intestate, and the Lady his Widow took Administration; and the Plaintiffs, the Children of the said *Robert Benson*, brought their Bill for an Account of the whole Personal Estate of their Father.

The Defendant the Administratrix by Answer said, she was not acquainted, before her Marriage, what Agreement her Father and Mr. *Benson* made, and that tho' she sealed the Deed, yet she did not read it, nor hear it read, before she sealed it: and that she was advised the Intention was, that Mr. *Benson* might have his Real and Personal Estate Free to dispose of it, if he thought fit; and he not having disposed of his Personal Estate, but dying Intestate,

she had taken Administration both in the *Prerogative* and at *York*; and was therefore Intituled to her distributive Share of her Husband's Personal Estate: and insisted that her Jointure, which her Husband affirmed was 500*l. per Ann.* being but 400*l.* she ought to have that made good out of his other Lands; but there was not any Covenant that the Jointure was 500*l. per Ann.*

For the Defendant it was insisted, that her Title as Administratrix was not expressed in the Agreement, tho' her Customary Part was, and that was *casus omissus* in the Agreement; and so she ought to have that.

But the *Lord Chancellor* declared, that the Intent was plain to exclude her wholly of the Personal Estate; and she could not be intituled to a Distributive Part of his personal Estate without his dying Intestate; and it is plain it was in his Prospect to bar her of what she could claim by the Custom or any other means whatsoever: And declared, the taking Administration was in violation of the Agreement; and if she takes as Administratrix, what she so takes must be made good out of the Jointure to the Children: and Decreed an Account of the whole Personal Estate to be taken by a Master, and the same to be put out for the Plaintiffs Benefit: and the Plaintiffs not opposing it, It was Ordered that 100*l. per Ann.* should be added to their Mother's Jointure.

The Defendants, 10 *July* (83) or (84) obtained a Rehearing of this Cause by the *Lord Keeper Guilford*; who upon the Rehearing of it, Declared, that the Allowance of 100*l. per Ann.* a-piece Maintenance made the Defendants for the Plaintiffs by the *Lord Nottingham* (for so much was allowed them by this Decree) was too much; but in regard for the time to come the Charge of their Maintenance would be greater, Ordered they should be maintained at that rate till their Ages of fourteen; but did not think there should be any Additions to the Jointure. But the
Defen-

Defendant, the Lady *Bellasis*, must take it according to the Settlement; and conceived her Right to the Personal Estate was not taken away or lessened by the Settlement; and therefore decreed one Third of the Personal Estate to the Defendants, to be enjoyed by them free of all Claims.

October the 31st, (85) the Plaintiffs obtained a Rehearing of this Cause by the Lord Chancellor *Jefferies*, as to the Third of the Personal Estate decreed to the Defendants; and he discharged the Lord *Guilford's* Decree, and confirmed the Lord *Nottingham's* Decree, as to the Personal Estate; but Decreed 150*l. per Ann.* to be allowed yearly for each Child's Maintenance.

And February 23, (86) the Lord Chancellor *Jefferies*, upon an Original Bill brought by the Defendants against the now Plaintiffs, Decreed the Plaintiffs, then Defendants in that Cause, to make the Lady's Jointure up 500*l. per Ann.* and this on the Evidence of her Father and Uncle, that *Benson*, when he proposed the Treaty of Marriage, offered to settle 500*l. per Ann.* Jointure; and that he did after the Marriage take Notice, the Jointure was not of that Value, and talked of making it up so much.

But note there was no Covenant or Agreement proved, whereby he bound himself to make a Jointure of that Value; and the Portion was but 3300*l.* to be paid on Contingencies, and not so good as 2000*l.* in Hand; But Mr. *Benson* was trusted to draw the Settlement.

The Lord *Guilford's* Decree seems to be inconsistent with it self, for he conceived the Defendants Right to the Personal Estate was not taken away or lessened, &c. and yet Decreed them but one Third of it; whereas if her Right was not lessened, she had a Right to a Customary Part, as well as a Distributive Part.



Cafe 10.

Pitt versus Hunt.

2 Ch. Rep. 73.

A Term assigned in Trust for the Feme before Marriage without the Knowledge of the Husband may be disposed of by the Husband.

THE Question was, Whether a Term assigned in Trust for the Feme before Marriage without the Knowledge of her intended Husband could be disposed of by the Husband.

It was insisted by the Council for the Woman, that it could not be disposed of by the Husband, and cited many Resolutions in this Court to that Purpose, as *Edmonds* and *Barrington's Cafe*, *Sir John Daccomb's Cafe*, and *Sandys's Cafe*: But on the other Side it was Answered, that true it is, there have been such Resolutions; but that now the Law is changed by the Resolution of the

Ante, Cafe 5. *Lords in Ch. Baron Turner's Cafe*, which is exactly the same Cafe with this, and it was there by all the Lords in Parliament resolved, that the Husband might dispose of the Trust of the Term.

The Lord *Chancellor* seemed to wonder at that Resolution, and said it could not amount to an Act of Parliament to change the Law; and altho' at first there possibly was no great Reason for those Resolutions, that the Husband could not dispose of a Trust for the Feme made without his Privy before Marriage; yet the Law being so settled, People made Provisions for their Children according to what the Law was then taken to be; and now those Provisions are defeated by this new Resolution; so that now it is almost impossible for a Man so to provide for his Child, but it shall be subject to the Disposal of an extravagant Husband: And he commended the Saying of *Chief Baron Walter*, viz. It is no matter what the Law is, so it be known what it is. But at last he said he must be concluded by the Lords Judgment, and so he Decreed it according to *Chief Baron Turner's Cafe*, saying that there must not be one sort of Equity above

Stairs

Stairs in the House of *Lords*, and another below Stairs in *Chancery*. And he thought that from henceforth it would not serve turn to have the Husband's Consent or Privy to an Assignment of a Term in Trust for the Feme before Marriage, unless he was likewise made a Party to the Assignment.

Arundel versus Roll.

Case 11.

IN a Bill to have an Account of Moneys received by the Defendant for the Plaintiff's Use, the Defendant insisted to have an Allowance for the Plaintiff's Diet at the Rate of 5 *l.* per Week, alledging that she was a Person of Quality and Fortune, and being courted by divers Noble Persons much was spent in Entertainments: But it appearing by Letters read in Court, that the Plaintiff came to the Defendant's House at her Invitation, and as a Guest only, the Defendant being her Aunt; It was said by the Lord *Chancellor* that it was no honourable Demand, and Decreed she should account without having any Allowance for Diet deducted.

In an Account no Allowance for Diet, where the Plaintiff came as a Guest at the Defendant's Invitation.

Jervois versus Duke.

Case 12.

SIR *E. Duke* by his Will devised a Legacy of 2000 *l.* to one of his Daughters; but if she should marry one *Bacon*, that then the Legacy should be void. She having before her Father's Death married the said *Bacon*, takes Advice upon the Will, and is advised that the Legacy was void by reason of her having married *Bacon*. Her Brother pays her 800 *l.* and she Releases her Legacy.

The Bill was to have this Release set aside, and her Legacy made good to her, pretending she was circumvented in this Release, her Brother telling her she had no Legacy given her by her Father's Will, but was ras'd out
of

of it, and that he suppress'd the Will, and did not Prove it till after such time as he had obtained this Release.

A Release shall be avoided, where there is *Suppressio veri* or *Suggestio falsi*.

To which it was said by my Lord *Chancellor*, that it is the constant Rule, where there is either *Suppressio veri* or *Suggestio falsi* the Release shall be avoided.

Then they went on to Prove that Sir E. Duke in his Life-time did actually revoke this Will, and declare his Daughter should have no such Legacy.

An Executor may be admitted to prove the Revocation of any Legacy, tho' he has Proved the Will.

To which it was Objected, that they could not be Admitted to that Proof, by reason that the Defendant himself had Proved the Will, which he could not do without taking an Oath, that it was his Father's last Will. *Sed non allocatur*; for that he only Swears, that he believes it to be his Father's last Will, and at that time he might not know of the Revocation.

A Legacy given to a Feme on condition not to marry without the consent of J. S. is only *in Terrorem*, if not Devild over.

And it being fully proved, that the Father had revoked this Legacy, it was Decreed by the Lord *Chancellor* against the Plaintiff, saying, that where a Legacy is Devild to a Woman, upon Condition she marry with the Consent of J. S; here if the Legacy be not Limited over, it is only *in Terrorem*, and tho' she marry without Consent, it doth not avoid the Legacy. But here in this case the Father himself having actually revoked the Legacy upon his Daughter's Disobedience, the Father himself has in this Case been Chancellor, and that with Equity too: such an Example of presumptuous Disobedience highly meriting such a Punishment; she being only prohibited to marry with one Man by Name, and nothing in the whole fair Garden of *Eden* would serve her turn but this *forbidden Fruit*.

Newland versus Horsfeman.

Cafe 13.

SIR *Benjamin Newland* being Sued upon his Charter party for Freight, exhibits his Bill to stay Proceedings at Law; and the Cause coming this day to be heard, the Cafe appeared to be, That the Ship being unladen at *Barcelona*, where the Freight was made payable by the Charter party, the Factor refusing to pay the Freight, the Master of the Ship Litigated there in the Admiralty for it; and the Cause was heard, and Judgment there given, That the Master should have his Freight, but the Damages the Goods had sustained in the Voyage by reason of the Deviation should be Deducted, and the Account transferred to the *Delinquitors*, who are in the nature of our *Masters in Chancery*, to take the Account, and the Mony ordered to be brought into Court; But the Factor had Appealed to a higher Court there.

A Sentence in a Court of Admiralty beyond Sea will conclude the Parties here.

Lord *Chancellor* declared, that he would not slight their Proceedings beyond Sea; and if in this Cafe the Damages had been there ascertained, or a Peremptory Sentence given, the same should have been concluding to all Parties: But it appearing the Factor was a Native of that Place, and therefore in all Probability might against Justice prevail, and *Horsfeman* being willing to desist his Suit there, his Lordship directed a Tryal here by Jury, to ascertain the Damages sustained by the Deviation.

Fawlkner versus Fawlkner.

Cafe 14.

THE Cafe was, that a Copyholder of Lands in Fee, where by the Custom of the Manor the Lord had as a Profit *Aprendre* the Cut of the Woods and Underwoods growing on the Copyhold, obtains a Grant from the Lord of all the Woods and Underwoods growing, and

The Lord of a Manor, where by the Custom he has the Cut of the Woods growing on the Lands, grants all the Woods and Underwoods

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which

on the Copyhold Lands to the Copyholder in Fee. This shall not Merge in the Copyhold.

which afterwards should grow on the said Copyhold Lands, to him and his Heirs; the Question was, Whether this should not Merge in the Copyhold, being, as was alledged, only a Profit *a Prender*. *First*, If a Copyholder pays a Rent to the Lord, and the Lord grants or releases this Rent to his Tenant, this shall Merge in the Copyhold. *Sed non allocatur.*

Devise of Lands to the Heirs at Law for 20 Years after the death of the Wife. This is an Estate for Life in the Wife by Implication; Otherwise, if the Devise is to a Stranger.

Secondly, In this Case the Copyholder devifes to *J. S.* these Underwoods for 20 Years after the death of his Wife, to raise Portions for his younger Children. And the Question is, whether the Feme had not by Implication an Estate for Life.

The Lord *Chancellor* said, that where such a Devise is made to the Heir, there indeed an Estate shall arise to the Wife by Implication; but where it is devised to a Stranger, as in this Case, there in the mean time it shall descend to the Heir.

Case 15.

How versus Tenants of Bromsgrove.

Bills of Peace to prevent Multiplicity of Suits are proper in Equity.

THERE having been two Issues directed, the One, whether *How* the Lord of the Manor of *Bromsgrove* had a grant of *Free Warren*; and the other, in case he had a grant of *Free Warren*, whether there were sufficient Common left for the Tenants: Upon Motion for a new Tryal, the Lord *Chancellor* said, these Matters were properly tryable at Common Law; and he did not see, what Jurisdiction the Chancery had of this Cause: But it was urged, the Bill was brought to prevent Multiplicity of Suits, and was in its nature a Bill of Peace: and a new Tryal was granted, upon Payment of full Costs.

Wilkinson versus

Case 16.

JOH^N *Wilkinson* one of the Six Clerks made his Will, and thereof made his Brother Executor, and Devised unto his Executor all his Estate both Real and Personal: And four Years afterwards he marries, and then by a Codicil makes his Wife his Executrix. The Question was, whether the Brother should have the Personal Estate as Legatee. It was urged, that he should; for he does not take it as Executor only, but by express Words of Gift in the Will; and it appears, that there was not only a Benefit intended him as Executor; for even the Real Estate was Devised unto him: But it being in Proof, that he had not any the least Real Estate in the World, it was said by the Lord *Chancellor*, that the Personal Estate was intended him only as Executor; and it was thereupon decreed for the Widow the Executrix.

A Man makes his Brother Executor, and gives him all his Real and Personal Estate, and afterwards marrying, by a Codicil makes his Wife Executrix. She shall have the Personal Estate; and not the Brother.

Tracy versus Tracy.

Case 17.

IN a Bill for Discovery of the Defendant's Estate, and to have the Writings brought into Court, and to prohibit Wast in plowing &c. The Defendant by way of Plea set forth, that in Part of the Land she had an Estate for Life, as a Jointress, without Impeachment of Wast.

A. Tenant for Life, Remainder to B. for Life, Remainder over. A. tho' punishable of Wast at Law, by reason of the mesne Remainder for Life, yet shall be enjoined from committing Wast in a Court of Equity.

It was Resolved by the Lord *Chancellor*, that although she was Tenant for Life, Remainder for Life, Remainder in Tail, so that she was punishable of Wast at Common Law by reason of the mesne Remainder for Life, yet in such Case this Court does always grant an Injunction to stay Wast: But if her Jointure Deed were made with an Express Clause of *without Impeachment of Wast*, as in Truth the Case was, then there could be no Prohibition as to those Lands.

But Tenant for Life without Impeachment of Wast shall not be enjoined from committing Wast.

Cafe 18.

Heyward verſus Lomax.

A. indebted on Security carrying Interſt, and on ſimple Contract, pays Money generally. It ſhall be taken to be paid towards diſcharge of the Debt, which carried Interſt.

Vid. poſt. Perris verſus Roberts. Cafe 33.

WHERE a Man owes Money on a Mortgage, and other Monys to the ſame Perſon on Account, for which he is not to pay any Interſt, and he makes a General Payment, without mentioning it to be in diſcharge of the Mortgage, or of the Monys due upon the Account: It ſhall be taken to have been paid towards diſcharge of the Money due on the Mortgage; becauſe it is natural to ſuppoſe, that a Man would rather elect to pay off the Money, for which Interſt was to be paid, than the Money due on Account, for which no Interſt is payable.

Cafe 19.

Dom' Rex verſus Sneller, Ruſſel & al'.

Superſedeas to a Writ de Excom. capiend' denied, tho' the *Significavit* was general and uncertain, and ſaid, that the Method was to proceed by *Habeas Corpus*. But an Appeal being brought, a *Superſedeas* was granted.

THE Defendants being Excommunicated for a Contumacy, and a Writ of *De Excommunicat' capiend'* awarded, It was moved for a *Superſedeas* to the Writ, by reaſon that the *Significavit* was general and uncertain. But it was ſaid by the Lord Chancellor, that a *Superſedeas* could not be granted upon that Ground; But if the Excommunication were not for any of the Offences within the Stat' of 5 Eliz. and the *Significavit* did not expreſs the ſame, the Remedy expreſſly appointed upon that Statute is a *Hab' Corpus*, and upon the Return of it, the Parties ſhall be diſcharged: But it being then alledged, that an Appeal was brought, and Security given to proſecute it with Effect, a *Superſedeas* was awarded, the Lord Chancellor ſaying, that the Appeal was a *Superſedeas* of it ſelf.

Coke and Hodges.

Case 20.

A Bill brought by an Administrator *durante minoritate*, and an Account decreed to be taken. The Infant marries, and thereupon the Administration during her Minority is committed to the Husband.

An Administrator *durante minoritate* obtains a Decree to Account; the Infant marries, and a new Administration during her Minority is granted to the Husband. Whether this second Administrator can carry on the Account.

Upon a new Bill brought to have the Benefit of the former Proceedings, the Defendant demurr'd, and the Question was, Whether this second Administrator could carry on the Account?

It was objected, that such an Administrator cannot at Law take Execution on a Judgment obtained by the former Administrator: But it was ordered that the Defendant should answer, and that Matter be saved unto him at the hearing of the Cause.

.... versus *Emerton*.

Case 21.

THE Defendant had obtained Judgment in Ejectment against the now Plaintiff, and had Execution awarded, but the Undersheriff refused to execute it; whereupon by Rule of Court of the *King's Bench* the Undersheriff was ordered to attend, and for not attending an Attachment was awarded against him. After all this Proceeding, the Defendant in the Ejectment exhibits his Bill in this Court, and *Emerton* praying a *Dedimus* an Injunction was granted of Course.

A. after Judgment in Ejectment, and a Writ of Possession taken out against him, brings a Bill, and has an Injunction on a *Dedimus*. This Injunction was allowed to extend to the Undersheriff, who had refused to execute the Writ, and was in Contempt to an Attachment in the K. B. before the Bill filed.

I moved my Lord that this Injunction might not extend to stay Proceedings against the Undersheriff for his Contempt to the Court of *King's Bench*; for that he was prosecuted for the Contempt at the King's Suit; and it was unnatural for the King by his Injunction to stay his own Suit in another Court, the Offence being committed before the Bill exhibited: Yet the Motion was denied by my Lord Chancellor.

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Termino S. Hillarii,

33 & 34 Car' II. 1681.

IN CURIA CANCELLARIÆ.

Case 22. *Horrell*, Executor of *Tipper*, Plaintiff.*William Waldron*, and three }
of his Children, Infants, } Defendants.

24 Febr. (81)

A personal Legacy given to an Infant more properly cognizable in Chancery than in the Ecclesiastical Court.

T*ipper* gave the three Children 200*l.* to be paid within a Year after his Death; the Executor brought his Bill, and set forth, that neither of the Children was 10 Years old, and that the Testator died about a Year since, and that the Plaintiff was willing to pay the 200*l.* so as he might do it safely, and be well discharged, and indemnified: And complained that the Father Sued him in the *Consistory* Court, to force him to pay the 200*l.* to the Father, without giving the Plaintiff any Security against the Children; their Father being a Butcher: And the Plaintiff insisted he could not be well discharged, but by a Decree in this Court; where Care would be taken to secure the Money for the Children, and for the Plaintiff's Indemnity and Discharge.

The Defendant demurr'd, for that this Matter was properly determinable in the *Consistory* Court, where the Mat-

ter

ter depended; it being for a Legacy, and that it was properly cognizable there.

But the *Lord Chancellor* declared, the Suit was proper here; and that if the Matter had proceeded to a Sentence in the Ecclesiastical Court, it was proper to come here for the Executor's Indemnity, and that here Legatees were to give Security to refund, but not there: And this Court would see the Mony put out for the Children, and so over-ruled the Demurrer.

Abery and Jones, Creditors of } Plaintiffs.
Pointz,

Cafe 23.

Williams,

Defendant.

Febr. 1681.

THE Bill set forth, that *Pointz* being indebted to the Plaintiffs 900*l.* and to others 3000*l.* became a Bankrupt, and 16 *Novembris* (80) a Commission was sued out against him, and he found a Bankrupt; and that several Suits of Tapestry of his were in the Defendant's Hands, which the Commissioners had assigned to the Plaintiffs for the Benefit of his Creditors, and that they ought to have an Account thereof; but that the Defendant pretended, they were pawned or sold to him by *Pointz* the Bankrupt without any Trust; whereas it was on a Trust, and done to conceal them; and so pray'd a Discovery and Relief.

Equity will not compel a Man to discover what Goods he really bought of a Bankrupt after the Bankruptcy and before the Commission sued out, where the Party has no Notice of the Bankruptcy.

The Defendant pleaded, that neither he, nor any in Trust for him, hath nor ever had any Goods belonging to *Pointz*, but what the Defendant bought *bona fide*, for a full Value in Mony really paid by the Defendant to *Pointz* or his Order, before any Commission of Bankruptcy was sued out against him, and before the Defendant had any Notice that *Pointz* was a Bankrupt, or had done any Act of Bankruptcy, and without any Trust or Condition, other than that the Defendant by Parol did declare, that if *Pointz* repaid the Mony paid him by the Defendant, and

Interest

Interest for the same, at the Time agreed on, and then past, that then he would redeliver to *Pointz* the Goods; and averr'd, that *Pointz* failed to pay the Mony or any Part of it at the Time agreed on; and that *Pointz* two Years since agreed, that the same should be sold by *J. S.* and that by the Mony so to be raised, the Defendant should be paid his Mony with Interest, and the Surplus to *Pointz*; and averred, that the Mony raised by Sale was 200*l.* short of what *Pointz* owed him, and which 200*l.* was still due; and that 19 *Octobris* (80) *Pointz* gave the Defendant a general Release to that time; and that the Defendant had no Dealings with him since: And the Defendant further pleaded, that he had been examined by the Commissioners, as far as by Law he was obliged; and insisted, that being a Purchaser so as aforesaid, he ought not to be put to Answer, to subject himself to an Action, which the Bill aimed at, by pressing a Discovery of what Goods of the Bankrupt's came to the Defendant's Hands.

The *Lord Chancellor* allowed the Plea; and said, the Law was hard against Tradesmen, that dealt with Bankrupts before Notice; and the Assignees ought not to be assisted in Equity in any such Case.

Note, There was the like Rule before given in the Case of one *Portman* the Banker, in the present *Lord Chancellor's* Time.

Case 24.

Purefoy versus *Purefoy*.

Where a Deed of Trust is made for Payment of Debts, it shall extend only to Debts contracted at the time of making the Deed.

J. S. makes a Deed of Trust for the Payment of his Debts, to take effect after his Death. The Words in the Deed were, *Moneys owing by him*; and a Schedule was annexed to the Deed, wherein mention was made of 1000*l.* owing to *A*, and 500*l.* owing to *B*, and then there is this *Item*, viz. the Sum of 3000*l.* owing to other Persons.

It

It was urged, that the Lands should stand charged by this Deed, not only for such Debts as were owing by him at the time of making thereof, but for any Debts he afterwards contracted, so as they did not exceed the Sum mentioned in the Schedule.

But it was Decreed, that those Lands should stand charged only with such Debts as were owing at the time of making of the Deed. And the Lord *Chancellor* said, it was so in all Cases, where a Deed is made for Payment of Debts owing, unless it be expressed to be for Payment of such other Debts; as he should afterward Contract, or to that effect.

In this Case the Heir at Law by his Bill prayed an Account against a Trustee for two several Estates that were conveyed unto him upon Trust for Payment of several and distinct Debts; and now would have had his Bill dismissed, as to one of the Estates, and have had the Account taken for the other only.

But it was decreed, that an Intire Account should be taken of both Estates; For that it is allowed as a good Cause of Demurrer in this Court, that a Bill is brought for Part of a Matter only, which is proper for one Intire Account, because the Plaintiff shall not split Causes and make a Multiplicity of Suits.

And Mr. *Hutchins* said, where a Bill is brought to redeem two Mortgages, and there is more Money lent upon one of them than the Estate is worth, the Plaintiff shall not elect to redeem one, and leave the heavier Mortgage unredeemed, but shall be compelled to take both or none.

Case 25.

Fane and Fane.

A. by Will directs 1000 l. to be laid out in her Funeral, and raised out of her Plate and Jewels, and then gives the rest of her Goods and Chattels to her Executors: And in another Clause, gives her Executors 100 l. a-piece for their Trouble, and after Debts and Legacies paid, gives all the rest of her personal Estate to the Children of B. Decreed the whole Surplus to the Children.

THE Countess Dowager of Bath by her last Will, devis'd divers specifick Legacies, and that 1000 l. should be lay'd out in her Funeral, to be raised out of her Plate and Jewels, and then adds, *I give the rest of my Goods and Chattels unto my Executors*, and afterwards in another Clause, *I give unto my Executors the Sum of 100 l. a-piece for their Care and Trouble, and after my Debts and Legacies paid, I give all the rest of my personal Estate unto the Children of Sir Francis Fane, the Money to be paid into the Hands of their Father*; and makes Sir Francis Fane, Sir Henry Fane, and Mr. Cobb her Executors, &c.

Mr. Serjeant *Maynard* would have had this Will so construed, that both the Clauses might stand together; viz. That the Executors should have had all the rest and residue of the Goods and Chattels, and that the Children as residuary Legatees should have had only all the rest of the Mony: Or, if the Words, *Goods and Chattels*, should be construed to comprehend all the personal Estate, so as the Clauses could not be reconciled, Mr. *Solicitor* pressed, that the Children and the Executors should be joint residuary Legatees; as where Land in the same Will is first devised to one, and afterwards to another, they shall take it between them, notwithstanding my Lord *Cook's* Opinion, that the latter Clause revoked the first.

But it was Decreed by the Lord *Chancellor*, that the Children should have the intire residuary Estate.

First, Because the Executors have 100 l. a-piece Devised to them.

Secondly, Altho' the Words of the Will are, (as was observed by Mr. Serjeant *Maynard*) that the Moneys should be paid

paid into the Father's Hands, yet *that* shall not be taken to explain what personal Estate the Testatrix intended them, *viz.* only the rest of the Mony and Debts, as Mr. Serjeant would have it. And it cannot be thought that my Lady *Bath* intended to make so nice a difference between her Goods and Chattels, and her personal Estate.

Thirdly, For that one may aver the Trust of a personal Estate: and Mr. *Cobb*, one of the Executors, swears my Lady's Intent was, that the Children should have the Residue of all her personal Estate.

It was therefore Decreed, that the Residue of the Mony should be paid into their Father's Hands, according to the Will, and the rest of the personal Estate delivered to the Children.

Brown versus Allen.

Case 26.

IT was declared by the Lord *Chancellor*, that where a Man devises a specifick Legacy, there tho' the other Legacies fall short, yet the Legatee must have his specifick Legacy intire: But where a Man devises several Legacies, as 100*l.* to one, and fifty to another, &c. there although he directs the Legacy of 100*l.* to be paid *in the first place*, yet if the other Legacies fall short, there the Legatee of the 100*l.* must make a proportionable Abatement of his Legacy.

In case of Deficiency of Assets a specifick Legatee shall not abate in proportion with pecuniary Legatees. But one pecuniary Legatee shall abate in proportion with the rest, tho' his Legacy is directed to be paid in the first place.

Smithby versus Hinton.

Case 27.

ALtho' an Executor does actually release, yet he must be made a Party to the Suit.

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Cafe 28.

Gee versus Spencer.

Release set aside
by reason of
the Misappre-
hension of the
Party.

A Man possessed of a Lease for *three* Lives of the Rectory of *Orpington* in *Kent*, devised the Rectory by his last Will; but that being void, It came to his three Daughters as Coheirs and special Occupants. There being a Suit touching this Rectory in *Chancery*, the Husband of one of the Daughters fearing to be in Law, and being made to believe, that he should be forced to pay Costs, released the Arrears that should be coming to him for his Share of the Rectory to the other Sisters, who were to bear the Charge of the Suit; his Share of the Arrears amounted to 1000*l*.

This Release was set aside, and *Luxford's* Cafe cited, that a *Misapprehension in the Party* shall avoid his Release.

Cafe 29.

Silway versus Compton.

A Common, that has been Inclosed for 30 Years, shall not afterwards be thrown open.

Cafe 30.

Thickness versus Vernon.

A Devise to
two Persons
to be equally di-
vided between
them, makes
a Tenancy in
Common.

A Man makes *A* and *B* his Executors, and directs that 2000*l*. of his Personal Estate shall be laid out in Land for the Benefit of his Wife for Life, and then to his Executors to be equally Divided betwixt them. The Wife and One of the Executors dies before any disposition made of this Mony.

Decreed by the *Lord Chancellor*, that this Mony should not survive: And he cited a Cafe in the late Times, where a Man devised his Personal Estate unto two Per-

sons equally, and there by the Advice of the Lord Chief Justice *Rolls* it was Decreed, it should not survive.

Howard versus Harris.

Cafe 31.

HOWARD mortgages Land, and the Proviso for Redemption was thus: Provided that I my self or the Heirs Males of my Body may redeem. The Question was, Whether his Assignee should redeem it? and it was decreed, he should; for, if once a Mortgage always a Mortgage.

² Ch. Rep. 147.

Proviso in a Mortgage that the Mortgagor or the Heirs Male of his Body might redeem.

Decreed the Assignee might redeem. *Post.*

Cafe 191. and 212.

Vid. ante Cafe 6.

In this Cafe Part of the Mortgaged Estate happened to be in Mrs. *Howard's* Jointure, and it was admitted that she thereby was intituled to a Redemption of the whole Mortgage; and so it was adjudged in the Cafe of *Browne* and *Edwards*.

Sir James Hayes versus Kingdome.

Cafe 32.

LORD *Ranelagh*, *Dashwood* and five others upon their Farming of the *Irish* Excise entred into Articles, that if any of them died their Parts should survive; and a Covenant, that none of them should assign without Licence from the rest. One with Licence, but not in all points agreeing with the Articles, assigns to his Son and a third Person in consideration of five Shillings, and dies. The Question was, whether his Assignees should come in for his Share. But it was objected that this Assignment should only Impower the Assignees to act and come in as Agents, but should not intitle them to the Interest and Benefit of the Assignor's Share.

Joint-tenants. Survivorship.

It was said by the Lord *Chancellor*, If there had been no Covenant that it should survive, yet in Equity it ought, by reason of the joynt Charge and Expence. If there had been any Agreement amongst the Farmers that it should not survive, that might have altered the Cafe;

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but that is not so much as pretended, nor is there the least Proof of it: And the Consideration of the Assignment being but 5 s. it cannot be thought, it was ever intended that the Interest of the Assignor should pass by it, but only an Agency or Power of acting: and had the Assignment been made by Mr. *Lemuel Kingdome* to his Son only, there the Consideration might have been for natural Love and Affection; but here the Assignment is made to his Son and another Person; So that Consideration is out of the Case. And the Bill to have the Assignment made good was Dismissed.

Case 33.

Perris versus Roberts.

2 Ch. Rep. 83.

A. is indebted by Bond (in which J. S. is bound as Surety) and also by Simple Contract to B. A. states an Account of both Debts with B. and makes a Bill of Sale, for securing the Balance, which proves deficient.

On a Bill by the Surety Decreed the Money arising by the Bill of Sale should be applied towards discharge of both Debts in Proportion.

PERRIS became bound as Surety for J. S. unto Roberts. J. S. owes Roberts a further Debt upon Simple Contract. J. S. and Roberts come to a stated Account for all Moneys owing to Roberts, as well for what was due on the Bond, in which Perris was bound as Surety, as for what was due to Roberts upon Simple Contract: and there being due to Roberts on the Foot of the Account 85*l.* J. S. makes him a Bill of Sale towards Satisfaction of the whole Debt.

It was insisted by Mr. *Sollicitor General* and others of Council for Roberts, that the Money raised by this Bill of Sale should in the first Place be applied to satisfy the Debt due on Simple Contract, and then what remained to sink the Debt, for which Perris stood bound as Surety; and the rather, for that in the Bill of Sale it is mentioned to be as a Security: and there is no Proof or Pre-
tence of an Agreement or Direction, that this Money should be applied to the Debt for which Perris stood bound; and to make any other Construction, would be to construe a Man out of his Debt.

To this Opinion at first the Lord *Chancellor* seemed to incline: But then it being insisted by Mr. *Hutchins* and others of

of Council with *Perris*, that it is natural to suppose, that where a Man owes a Debt upon Specialty, for which others are bound as his Sureties, he would in the first place take care to discharge that Debt, before another Debt that was due on Simple Contract only. But they did not insist that the Moneys raised by the Bill of Sale should in the first Place be intirely applied to satisfy the Debt for which *Perris* stood bound, but that both the Debts, that upon Specialty, and that upon Simple Contract, being blended and thrown together in one Account, and then a Bill of Sale made towards Satisfaction of the whole Debt, it was but Reason it should be applied proportionably, as well for the sinking of the Debt for which *Perris* stood bound, as towards Payment in Proportion of the Debt due on Simple Contract.

And it was so decreed by the Lord *Chancellor*, and solely upon this Reason, *viz.* that both the Debts had been cast into one Stated Account, and the Bill of Sale made towards Satisfaction of the whole Debt.

But Mr. *Sollicitor* was strong in his Opinion against the Decree.

Vid. ante Heyward versus Lomax, Case 18.

Danvers versus Earl of Clarendon.

Case 34.

THE late Earl of *D.* by his Will devised all his Goods in *Cornbury* house to the Lady *Gargrave* for life, and after her decease to the Heir of Sir *John Danvers*: And the Point was, whether he that was Heir of Sir *John Danvers* should take these Goods as Devisee, and the said Goods go to his Executors, altho' such Heir dye in the life-time of the Lady *Gargrave*; Or whether he that was Heir of Sir *John Danvers* at the time of the Lady *Gargrave's* Death should have them.

Goods devised to A. for Life, and after the Death of A. to the Heir of B. B. dies in the Life of A. Decreed the Goods should go to him that was Heir of B. at his Death, and not to him who was his Heir at the Death of A.

And it was urged by Mr. *W. Williams*, that these Goods were only the Furniture of the Capital House, and were *quasi* an Heir-loom.

But

But the Lord *Chancellor* was of Opinion, that they absolutely Vested in the Person of him, that was Heir of Sir *John Danvers* at the time of his Death; and took notice that the Lord *Clarendon* in his Answer swore all the Judges of *England* had so given their Opinions: And this Opinion of the *Chancellor* was confirmed by another Clause in the Will, wherein *Henry Danvers*, who was then Heir of Sir *John Danvers*, was mentioned by Name: And it was thereon Decreed accordingly, that they Vested in *Henry*, who was Heir of Sir *John Danvers* at his Death.

Cafe 35.

Pockley versus Pockley.

2 Ch. Rep. 84.

Here's fallutor
a Devisee shall
have the Per-
sonal Estate ap-
plied in case of
the Real.

UPON a Rehearing, the Cafe was thus. Sir *Jeremy Smith* lends *Robinson* 1600*l.* with an intent to lend 1400*l.* more, and takes a Mortgage for the Mony in *Pockley's* name. Sir *Jeremy Smith* dies. His Executors refuse to lend the other 1400*l.* hereupon *Pockley* advances 1500*l.* of his own Mony, and purchases an Annuity in Fee out of the Lands contained in the Mortgage, and takes an Assignment of the Mortgage to protect his Purchase, declaring the Uses thereof to be for the Benefit of him and his Heirs; and then makes his Will, and appoints all his Debts to be paid, and particularly mentions the Debt of 1600*l.* to Sir *Jeremy Smith's* Estate, and devises his Real Estate unto his Nephew: And *Pockley* dying within the Province of *York* without Child, where by the Custom, his Widow is Intituled to a Moiety of his Personal Estate,

The Question was between the Widow and the Nephew, who was Devisee of the real Estate, whether this Debt of 1600*l.* to Sir *Jeremy Smith* should be paid out of the Personal Estate.

It was insisted by the Council for the Widow, that in Cafe this 1600*l.* Debt was not really a Debt of *Pockley's*, his declaring it by Will to be his Debt, and appointing

it to be paid out of his Personal Estate, would not alter the Case; for that his Will could not work upon the Customary part; and to that Purpose they cited the Lady *Detbick's* Case, wherein it was adjudged, that even a Voluntary Conveyance could not affect the Customary Part: and to prove that it was not in truth his Debt, they compared it to the Case where a Man purchases the Equity of Redemption; In that Case although he purchases the Land subject to the Debt due on the Mortgage, and must hold the Lands subject to that Debt; yet *that* Debt can never charge his Person; nor doth it in any sort become his own proper Debt; and from hence it was urged, that this Annuity should stand charged with the 1600 *l.* and that it was never the Personal Debt of *Pockley*: and though it has been lately resolved, that *Hæres factus* shall be allowed the Benefit of having the real Estate discharged, yet such an Heir shall never prevail against the Custom.

A Man purchases an Equity of Redemption and dies. The Mortgage shall not be paid out of the Personal Estate for the Benefit of the Heir; it not being the Ancestor's Debt.

But it was Decreed by the Lord Chancellor, that this Debt due to Sir *Jeremy Smith's* Estate should be paid out of the Personal Estate; and chiefly for that *Pockley* by his Will (which were the Words of a dying Man) had declared it to be his Debt, and appointed it to be paid out of his Personal Estate, and that *Pockley* had got the Mortgage so Transferred as to protect his Purchase; and it was said by the Lord Chancellor, that not only he, who is *Hæres factus*, shall Pray in aid of the Personal Estate to discharge the Real, but even an Ordinary Devisee shall have that Benefit.

Lee versus Sir Robert Henley & al.

Case 36.

THE Case was thus. *J. S.* being Seized of divers Lands in *Dorset*, *Somerset* and *Devonshire*, (those in *Dorsetshire* being of equal Value with those in the other two Counties of *Somerset* and *Devonshire*) and having two Nephews, one the Son of his Sister *Henley*, and the other the Son of his Sister *Lee*, whom he intended to make his Heirs; He, to prevent Disputes between them

Omission in a Voluntary Conveyance not supplied in Equity.

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about the Partition of his Estate after his Death, by Conveyance executed in his Life-time settled all the Lands to the Use of himself for Life, Remainder to his Issue, if he should happen to have any, in Tail; and then appointed the Lands in *Dorsetshire* to his Nephew *Henley*, and the Lands in the other Counties to his Nephew *Lee*. In the Enumeration of the Particulars of the Lands in *Somerset* and *Devonshire*, a Farm or Manor of about 60 l. *per Ann.* was omitted; But after the Limitation of the Lands to his Nephew *Henley* there were added these General Words, *viz. And all other my Manors, Lands and Tenements, whereof no Use is already Limited, the same shall be unto the Use of my Nephew Henley, &c.*

It was insisted by *Henley's* Council, that this Manor or Farm, omitted as aforesaid, should pass to *Henley* by virtue of these General Words: But it was thereunto answered by *Lee's* Council, that the omitted Farm could not pass within those General Words; for that although, when he comes to distribute the Lands between his Nephews, *that* Farm is omitted to be Enumerated, yet in the Limitation to himself for Life, Remainder in Tail, there mention is made of that Farm, and so it is not within the words, *whereof no Use has been already limited*, for an Use of it was limited unto himself for Life: And it was Insisted by *Lee's* Council, that he ought to have this entire Farm; for that the Scrivener who drew this Settlement swore this Farm was intended to be settled on *Lee*, as well as the rest of the Lands in *Somerset* and *Devon*, and that so were his Instructions, and that the same was purely the Omission of the Clerk; and therefore they Insisted, that altho' this was a Voluntary Conveyance, yet being Provision for an Heir, the Intent of the Party might be supplied in Equity, and made good by an Averment consistent with the Deed; and for that Purpose they cited the Case of *Barrow* and *Barrow*. But the Lord Chancellor upon the whole matter did not think fit to Decree it for one or other of them, but left the Land in Question to descend equally between the two Nephews.

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Termino Paschæ,

34 Car' II. 1682.

IN CURIA CANCELLARIÆ.

Micoe versus Powell & Ux' & al'.

Case 37.

MICOE exhibits a Bill against *Powell* and his Wife and the Trustees of the Wife's Estate, setting forth, that one Sir *Samuel Micoe* devised unto the Plaintiff's Son several Manors and Lands of the Annual Value of 400 l. and that the Son died without Issue, whereby those Lands descended to the Plaintiff's Daughter; and setting forth, that the Defendant *Powell* had Clandestinely married his Daughter without his Consent, and had made no Provision for, or Settlement on her and her Children; And that he was informed the Defendant *Powell* intended to make his Wife, who is now an Infant, as soon as she should come of Age, to sell her Lands and levy a Fine of them: and for as much as the Estate in Law of the said Lands was in *A. and B. Trustees*, who could not be Compelled to transfer their Estate but in this Court, but threatned to do it voluntarily, unless prohibited by Order of this Court; Therefore out of a Fatherly Care of his said Daughter, and to the intent that a Provision and Settlement be made for her, and that he might be relieved

An Infant intitled to the Trust of Lands in Fee marries without the Consent of her Father. The Father brings a Bill against the Husband and Wife and her Trustees, that a Provision might be made for her and her Children out of these Lands. The Husband and Wife demur, and the Demurrer was allowed.

in

in all and singular the Premisses, Prays Process against *Powell* and his Wife and the two Trustees, &c.

To this Bill the Defendant *Demurred*, because it appeared of the Plaintiff's own shewing, that he had no Right either in Law or Equity to the Lands in Question, and that he does not pretend to be Trustee or Supervisor thereof, or any ways impowered to Inspect the Management of the same: and therefore he thinks himself not bound to satisfy his Inquisitiveness: neither ought he to be called in Question or Impleaded in this Honourable Court touching the same: and for that the Plaintiff's Bill doth contain no Equity, he doth Demurr in Law.

This Demurrer was allowed by the Lord *Chancellor*. But he said, if Mr. *Powell* had been Plaintiff here in *Chancery* to have the Trustees Transfer their Estate, or for any other Favour of the Court, then indeed, when he had such a hand upon Mr. *Powell*, he could make him do such things as should be reasonable; But upon this Bill there is no Colour in it.

Cafe 38.

Thompson versus Attfeild.

A Conveyance by way of Feoffment may Operate as a Covenant to stand seized.

Defect in a Voluntary Conveyance not supplied in Equity. Otherwise, if made for a Provision for Children.

IN this Cafe it was allowed, altho' a Conveyance be made purporting a Feoffment; yet nevertheless it may Operate as a Covenant to stand seized: And a difference was taken between the several sorts of Voluntary Conveyances; for tho' generally a Defect in a Voluntary Conveyance shall not be supplied and made good here, yet if a Man voluntarily makes a Settlement as a Provision for his Children, and for their Maintenance, such a Voluntary Conveyance shall be supplied and made good here.

Turner and Gwinn.

Cafe 39.

IN this Cafe it was said, that a Tenant in Tayl of an Equity of Redemption may devise it for the Payment of Debts.

Reason versus Sacheverell.

Cafe 40.

BARON and Feme levy a Fine of the Wife's Land, to enable them to take up the Sum of 400*l*. They borrow this Mony, and make a Mortgage for it; and after the Mortgage is Forfeited, the Husband pays in part of the Mortgage Mony; but afterwards borrows as much Mony more of the Mortgagee, as he had paid in before.

² Ch. Rep. 98.

Baron and Feme
by Deed and
Fine Mortgage
the Wife's
Land for 400*l*.
the Husband
pays in part of
the Principal,
and afterwards
borrows the
same Sum
again of the
Mortgagee.
Decreed the
Heir of the
Wife should not
Redeem with-
out paying off
both Sums.

It was Decreed, that the Mortgagee having the Estate in Law in him by the Forfeiture of the Mortgage, he should hold the Land against the Heir of the Wife, until the whole Mony was paid; and if the Heir would not pay in the whole Principal, Interest and Costs, he should be fore-closed.

Penn versus Chetle.

Cafe 41.

THE Commissioners for the taking of an Answer in the Country had omitted to Indorse the Writ, *Executio istius Brevis*, &c. For this Irregularity in the returning of the Answer, they had got the Answer referred to the Six Clerks; But upon Motion to the Lord Chancellor, for as much as the Commissioners had Indorsed on the Answer *Capt' & Jurat' &c. secundum effectum & tenorem Commission' huic annex'*, and had annexed the Commission to the Answer, it was Ordered the Answer should be allowed.

Executio istius
Brevis &c.
Omitted in the
Return of a
Commission to
take an Answer,
supplied by
other Words
in the Return.

M

Mallet

Case 42.

Mallet and Trigg.

A Parson Impropriate shall not have the Nomination of the Vicar.

IT was denied by the Lord *Chancellor*, that the Parson *de jure* has the Nomination of the Curate, and more especially where the Parson is of a Lay Fee, as was the Case in Question, *viz.* a *Prebendary* had demised for *three* Lives the Corps of his *Prebend*, which consisted of two *Impropriations*, and so now by the Statute were become Lay Fee: In the Lease were as general Words as was possible, and particularly that the said Lessee should find two Vicars for the aforesaid *Impropriations*, and pay to one so much, and to another so much. But the Lord *Chancellor* said, that by finding, was meant maintaining only, and not electing or choosing; and he said, there was a great Difference as to the Parson's Right of naming or choosing his Vicar, where the Parson was of a Lay Fee, and where he had a Cure of Souls: for in the latter Case there was reason he should approve of the Man, who was to act under him in so high a Trust. And the Curate that came in by Opposition to the Lessee, was established by the Lord *Chancellor*, and the Charity Decreed to him.

Note, This Case came before the Lord *Chancellor*, upon Exceptions to a Decree of the Commissioners of Charitable Uses. One Exception was, that by the Stat. of 29 of this King, none but Ecclesiastical Persons could augment poor Vicaridges, so as to be established as a Charitable Use within that Statute, and that the Lessor in this case, who was only a *Prebendary*, was not within that Statute. *Sed non allocatur.*

Case 43.

Man versus Ballet.

No Agreement of the Parishioners, where several Charities are given for

UPON Exceptions to a Decree by the Commissioners for Charitable Uses, the chief Matter insisted upon was this. Here were several distinct Charities given to a Parish, *viz.* such a Farm worth 12 *l. per Ann.* for repairing

ing the Church, another Farm worth 6*l.* per Ann. for mending the Highways, and so much to the Poor, &c. in all 40*l.* per Ann.

several Purposes, can alter them, or divert them to other Uses,

The Complaint against the Trustees of this Charity was, that the Church had been out of Repair, and the Rents of the said Farm of 12*l.* a Year were not applied for the Repairs of the said Church, but a Levy Rate had been raised on the Parishioners for such Repairs.

The Trustees reply, that what they wanted in Weight, they had in Measure. What was deficient as to the repairing of the Church, was ballanced and made amends for in the Greatness and Excess of the other Charities, *viz.* towards the Poor, and for the Highways, &c. and that all these Charities were intirely for the Benefit of the Parish, and no one Person concerned in them more than another; and that therefore if they had not exactly pursued the precise Original Direction of the Charity in its first Institution, yet they having done nothing for any Man's private Advantage, but things only that were necessary, and Parochial Concerns, and in ~~them~~^{regard} they had really and *bona fide* expended all the Moneys they had received by vertue of this Charity, they hoped *that* should excuse them for the time past; and the rather for that they had but trod in the Steps of their Fore-fathers; for that for above 20 Years together this Mony had been promiscuously disposed of.

But the Truth of the Case fell out to be, that they had applied this Mony for the finding of a *Lecturer*, and had allowed him 10*s.* a Day, there not being then any One to officiate within the Parish: And it was urged, that this was in ease of the whole Parish, who otherwise must have found a Minister, and so it was the same thing to them whether they paid their Mony for the Church or Minister.

But

But the Lord *Chancellor* said, If it should be admitted that for Parochial Charities the Parishioners might by Agreement change and apply the Charities, as they thought fit, it would be a great Step towards destroying all Charities; and at this rate we should have all Persons Charities given away to Preaching Ministers and Lecturers; but they should not thus think *to rob Peter to pay Paul*: However for as much as this Mony for a long time had been thus promiscuously applied for the time past, they should not be punished for that Misemployment in any thing, saving as to what was paid to the Parson, for which they should not be allowed one Farthing: and directed the Account to be so taken.

Another Exception was, That the Commissioners of Charitable Uses by their Decree had charged them with the Rent of the Premises for two Years longer time, than in truth they had received it.

As to that the Lord *Chancellor* declared, That a Trustee for a charitable Use was not otherwise or further chargeable than any other Trustee is, who is only to be charged for so much as he receives, and shall not stand charged for the Receipts of others.

Note, Mr. *Attorney* in this Case harped much upon it, that this *Lecturer* was a *Presbyterian*, and as soon as he had done in the Church would run into a *Conventicle*; and upon his repeating this Matter so very often, the Lord *Chancellor* told him, he was not to be led or harangued with Prejudice into a Cause. It was not before him in this Cause, whether the Man was a *Presbyterian* or not: he minded the Matter only, and not the Man.

Anonimus.

Cafe 44.

A Mortgagee shall not Account according to the Value of the Land, *viz.* He shall not be bound by any Proof that the Land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful Default: as if he turned out a sufficient Tenant, that held it at so much Rent, or refused to accept a sufficient Tenant that would have given so much for it.

Mortgagee shall not Account for more than he actually receives, unless where he has been guilty of a wilful Default; as if he has turned out or refused a sufficient Tenant.

Newman versus Johnson.

Cafe 45.

A Man seized of Copyhold Lands surrenders them to the Use of his Will, and then by his Will says, *viz.* My Debts and Legacies being first deducted, I devise all my Estate both Real and Personal to J. S. And held by the Lord Chancellor, that this should amount unto a Devise to sell for the Payment of his Debts.

My Debts and Legacies being first deducted, I devise all my Estate Real and Personal to J. S. This amounts to a Devise to sell for Payment of Debts.

In this Cafe it was said by Mr. *Sollicitor General*, that a Parol Declaration is sufficient to subject Lands to the Payment of Debts, where a Man has but an Equity only.

Jones versus Purefoy.

Cafe 46.

JONES having a Demand on *Purefoy's* Estate, as a Creditor for Money borrowed by *Purefoy's* Father, and secured by Mortgage on this Estate, *Purefoy* sets up a Marriage Settlement, some time precedent to the Mortgage, to defeat it.

By a Proviso in a Marriage Settlement the Deed was to be Void, if the Marriage was not had in 10 Months.

The Cafe was thus, in 1672 *Purefoy's* Grandfather being seized of the Estate in Question makes this Settlement

The Heir sets up this Settlement to defeat a Mortgage made by his Father, after

his Father had sworn, that he was not Married within the ten Months. on his Grandson; But in the Deed there is this Proviso, viz. that in case the Marriage did not take effect within Ten Months then next ensuing, then all the Limitations and Uses in that Deed should cease and be void. Afterwards in 1674 *Purefoy* the Father borrows Money on this Estate, and in his Answer swears, that this Estate is not any wise Incumbered, for that the Marriage did not take effect within the Ten Months: And now the Grandson sets up this Deed of Settlement; and in the Replication the Plaintiff disclosed this Special matter, viz. that *Purefoy* the Father was not Married within the Ten Months according to the Proviso in the Deed.

The Lord *Chancellor* on the hearing having Decreed it against the Defendant *Purefoy*, as well for that his Father's Oath was so strong against him, as also for that *Purefoy* could not make it appear that his Father was married within the Ten Months by the Deed appointed:

The Defendant upon a Petition obtained a Rehearing, suggesting that the Special Matter disclosed in the Replication came not in within time, so as to be Examined to, and put in Issue, and now the Defendant had discovered full and strong Proof; but he could obtain no Relief on the Rehearing.

First, It was Objected by the Plaintiff, that this Settlement was but a Voluntary Settlement, and therefore could never prevail against a Purchaser, and that without Notice: But as to that Objection, they gave this clear Answer. It was true, it was a Voluntary Settlement; and if it had been made by the Person that Mortgaged these Lands, it shou'd never Prevail against a Purchaser: But here the Settlement was made by the Grandfather, and the Estate passed from him; But the Mortgage was made by the Father, who was never seized nor possessed of the Estate.

Voluntary Settlement made by the Father is fraudulent as to any Mortgage made by himself. Otherwise as to a Mortgage made by the Son.

It was then insisted on the behalf of the Defendant, that the Replication in which this Special Matter was disclosed, came not in time, and so was not properly in Issue; and therefore the Defendant having now sufficient Proof to maintain that his Father was married within the *ten* Months, *that* Proof ought to be received: And they produced the *Parson* that married them, who was ready to swear, that he married them within the *ten* Months, and that the Register Book of the Church, by which this Matter should have been properly proved, was lost. And they produced a Printed Book supposed to be printed just upon the Marriage of the Defendant's Father, in which amongst other things was contained an *Epithalamium* (which Mr. *Phillips* called an *Elegy*) Two strong Lines whereof were, *viz.*

And every Day of the Year shall be to you

The fifth of Jan. One thousand six hundred and seventy two.

Which they would make use of as an Argument, that the Defendant's Father was married in 1672. But on the other side, they maintained that their Replication came in within time; and therefore no new Proof could be admitted.

The Lord *Chancellor* took Notice of what dangerous Consequence it would be; that if after Publication passed, and People seeing where a Cause pincht, they should then be at liberty to look out Witnesses to boulder up the faulty part of the Cause, the necessary Consequence would be Perjury: And he declared where a Man had a just Debt due and owing to him (as this was of all hands admitted to be) if such a Man could in any case, even by the strictest and most precise Rules of the Court, get any Advantage of an Heir, &c. he would never be instrumental in depriving him of that Advantage: and therefore he confirmed his former Decree, and establish'd the Mortgage.

Where a Creditor can, even by the strictest Rules of the Court, get any Advantage, he shall not be deprived of it.

And *Purefoy's* Council having prest the Case of what pernicious Consequence it would be to their Client, there

there being divers other Creditors, and that the Debts would nigh swallow up the whole Estate; the Lord *Chancellor* said, the other Creditors would not have altogether so great an Advantage, as Mr. *Jones* now had, by reason of the Forms of the Court; yet even as to them, when they should come into *Chancery*, the Defendant *Purefoy* would have a very difficult Defence, when he went about to perjure his own Father in a Court of Equity by the Evidence of the *Parson* and the *Epithalamium*.

Case 47.

Goilmere versus Battison.

An Agreement by Feme, when sole, that if she died without Issue, she would leave I. S. 500 l. or the Land.

THE Heir at Law pretending a Right to the Land in Question, came to the Tenant in Possession, who likewise claimed an Interest in the Fee; and threatening to evict her at Law, she makes this Promise, *viz*, *If I dye without Issue of my Body, I'll either give you 500 l. or leave you my Land*: and now she being dead, and having devised her Land to her second Husband, who had never any Notice of this former Agreement, a Bill was brought to have an Execution of this Agreement.

It was insisted, that this was all the Portion her Husband had with her, and therefore he was *quasi* a Purchaser; and that a Remainder after an Estate Tail is so remote, that such an Agreement should never be executed, in Equity: For if the Wife had really by Deed executed feoffed the Estate to the Use of her Self in Tail, Remainder in Fee to the Plaintiff, yet she might at any time have dockt that Remainder by a Common Recovery.

But the Council on the other side insisted that an Agreement for such a Remainder should be executed in Equity, and that the Plaintiff could in no sort be called a Purchaser: and cited the Case of Serjeant *Maynard* versus *Mosely*, where such an Agreement after an Estate Tail was decreed.

1 Ch. Rep.
253.

The

The Lord *Chancellor* decreed the Agreement to be Executed.

Darcy versus Hall.

Case 48.

WHERE an Heir or Trustee buys in an Incumbrance, he shall be allowed no more, than what he really pays for it; unless he bought it to protect an Incumbrance to which he himself is intitled: But where a Stranger that has an Incumbrance upon an Estate buys in another Security to protect his own, he shall not only hold it, till he is satisfied his own Debt and has Reimbursed himself the Money paid for the Incumbrance he bought in, but even till he has received all the Money and Arrears of Interest due on the Security he so bought in. And in this Case, tho' it was an Heir that bought in an Incumbrance (there being some Special Circumstances in the Case) he was allowed on Account the whole Money due on the Incumbrance he bought in, tho' he paid less for it.

Where a Mortgagee buys in an Incumbrance, he shall be allowed all that is due on it, tho' he bought it in for less. Otherwise, if an Heir or Trustee buys in an Incumbrance.

The Earl of Huntington versus Greenville.

Case 49.

THE Case was thus. One Mr. *Lewis* being Seized of the Lands in Question on which there were two several Statutes, amongst other Incumbrances: the Prior of the said Statutes, which was a Statute for 1000*l.* was bought in by the Earl of *Huntington* for 300*l.* it having been formerly extended, and then but 300*l.* remaining due upon it. The next Statute was for a great Sum of Money, and belonged to the Defendant; and it was alledged, that the Plaintiff had notice of the Defendant's Statute, and was once in Treaty about buying it in. Two Years after the Plaintiff had bought in the first Statute, he Purchases the Lands in Question: And afterwards the Defendant having Notice of the Statute that was Assigned to the Lord *Huntington*, endeavours, as was alledged, to get

Assignee of a Statute purchases the Estate, having notice of a Second Statute. How far he shall make Use of the first Statute to protect his Purchase.

some of the next of Kin to the Conufee of the First Statute to take out Letters of Adminiftration *de bonis non* of the faid Conufee of that Statute, to the intent that the Defendant might bring a *Scire fac' ad Computandum* againft them to come to an Account with him upon the First Statute, and pay them off what fhould be due, if any thing, and to have the faid First Statute Vacated, that fo he might be let in upon his Security: But they declining to accept of fuch Adminiftration, he himfelf took out Letters of Adminiftration *de bonis non* of the faid Conufee, and procured the Officer in the *Petty-bagg* to vacate the faid Statute: And now the Lord *Huntington* exhibited his Bill to be relieved againft the undue vacating of this Statute.

It was Obferved, That where a Statute is extended, it cannot be tryed in an Ejectment, whether it be fatisfied or not; but the only Remedy is by a *Scire fac' ad computandum*, or Bill in *Chancery*; But where Land is extended upon an *Elegit*, the Debt and yearly Value appear on Record, and it may be well known when the Debt is paid, and may come in Evidence upon a Tryal, in an Ejectment.

Secondly, It was Obferved by Mr. Serjeant *Maynard*, That the Plaintiff's Council had much miftaken the Law in what they affirmed: For the Law was clear and certain, that where a Statute is once extended, there, though the Conufee afterwards affign the fame, yet neverthelefs the Conufee himfelf, his Executors or Adminiftrators, may releafe or difcharge fuch Statute, and it fhall be good and binding in Law.

Thirdly, He faid, there was a great difference where a Man was firft a Real Purchafor without Notice, and then finding Incumbrances to arife upon his Eftate, there, when he was faft and once in, it was lawful for him to get in what antient Securities he could to corroborate and protect his Purchase: But this is quite another Cafe, for here the Plaintiff had bought in this Statute at leaft two
Years

Years before his Purchase, and so it could not be said to be done for the Protection of his Purchase; and insisted, that in this Case the Lord *Huntington* ought not to be looked upon as a Purchaser, having before his Purchase Notice of the Defendant's Statute; And that a Man having a Real Debt might well secure himself by getting the Statute thus Vacated, and that being once done, this Court ought not to take from him the Advantage he had in Law.

But it was then insisted by the Lord *Huntington's* Council, that the Defendant ought not to profit by the Art and Skill he had used in getting this Statute vacated, the same being unduly done, and not according to the course of Law, which should have been done regularly by a *Scire fac' ad computandum*: And the Defendant having intruded himself into an Administration, to which he had no Colour of Right, on purpose to defraud the Plaintiff, it ought not to avail him; and if he had been a fair and rightful Administrator, yet his Intestate under whom he comes in, having Assigned the first Statute for a Valuable Consideration, tho' the Administrator, might have a power of Releasing or discharging it in Law, yet he was but as a Trustee for the Assignee, and must be answerable to him for the Breach of Trust.

And the Plaintiff's Council insisted that they ought to have a Perpetual Injunction to quiet them in the Possession: but the Defendant's Council insisted, that this Court ought not to Interpose and Abridge him of the Advantage he had at Law, he being a real and true Creditor.

Lord *Chancellor* declared, that each of their Demands were over rigid. And first he declared that the Defendant should not profit by this vacating of the Statute, but that the Plaintiff should be restored and put in the same Plight, as if this Statute was still in force. But then the Plaintiff must go to an Account upon this Statute, and if it was already satisfied, or the Defendant would pay what should remain due thereupon, then the Defendant must be let in.

Consequence of a Statute having extended the Land, assigns to J. S. and dies. One that had a second Statute, gets Administration, and acknowledges Satisfaction on the first Statute.

Mr.

Equity will relieve against this Practice, and put the Assignee in the same Plight, as if the Statute was still in Force.

Mr. *Bows* of Council for the Plaintiff urged, that this Statute should lye as a perpetual Cover and Fence to this Estate, and that all the Profits of the Estate received since the Purchase should be taken to be received as a Purchase for only, and not be applyed towards Satisfaction of this Statute; and the rather, for that although the Statute was once extended, yet the Plaintiff had not Possession by vertue of this Statute, but by reason of his Purchase.

But that was utterly denied by the Lord *Chancellor*, For that no Purchaser should be further or longer protected by an Incumbrance bought in, than till such time only as he had received so much of the Profits as would satisfy that Security, and that then the same should be Avoided by a *Scire fac' ad computandum*, or by an Account to be taken in this Court; And his *Lordship* was of Opinion, that altho' the Statute in this Case was bought in before the Purchase, yet that made no difference in the Case, but was as good, as if it had been bought in afterwards to protect the Purchase, and therefore the Lord *Huntington* should be looked upon as a Purchaser, having such Security to protect his Purchase: And the Favour that this Court allows to such a Purchaser is, that he shall account only according to the extended Value, and not according to the real Value of the Estate.

The Council for the Plaintiff seeming dissatisfied with this Direction, the Lord *Chancellor* told them, If all had been said as might have been said in this Case, it would not have fared so well with them; For it would be a President of very mischievous Consequence, that a Man having bought in a Prior Incumbrance, and having notice of a subsequent Statute, should then purchase the Land with this Notice, and yet have any Protection or Favour shewn him in it; and put them in mind of Sir *John Fagg's* Case, which the Defendant's Council could not remember to urge, where he being a Purchaser came into a Man's Study, and there laid Hands on a

Statute, that would have fallen on his Estate, and put it up in his Pocket; and in that Case, he having thereby obtained an Advantage in Law, tho' so unfairly and by so ill a Practice, the Court would not take that advantage from him.

Mildmay versus Mildmay.

Case 50.

2 Ch. Rep. 102.

IN this Case the Answer of the Defendant in the Spiritual Court being offered in Evidence against him here, it was opposed by Mr. Serjeant *Maynard*; But Mr. *Solicitor General* made answer, that it was true, Depositions against a Man in the Spiritual Court should not be made use of here without some special Order for that Purpose; But a Man's own Answer upon Oath, let it be taken where it will, tho' it were a Voluntary Oath before a Justice of the Peace, shall be read against him here. Mr. Serjeant *Maynard* replied, they ought then to have given them Notice of it.

A Man's Answer in the Spiritual Court may be read against him in this Court.

In this Case the Plaintiff having settled 50 *l. per Ann.* in Trust for his Wife, she afterwards obtain'd a Sentence in the Spiritual Court to be divorced from her Husband *a mensa & thoro*, wherein reciting that her Husband had already settled this 50 *l. per Ann.* on her, the said Court adjudged to her 50 *l. per Ann.* more for *Alimony*; and now she exhibited her Bill in Chancery, suggesting that her Husband had, on purpose to defraud her of this Rent, procured the Tenants to surrender their Estates, on which the said Rent was reserved, &c. And therefore prayed this Rent might be made good to her by the Decree of this Court.

How far Equity will aid a Wife to recover an Annuity settled by the Husband for her separate use, after an Elopement and an Offer of the Husband's to cohabit with her.

But the Defendant's Council insisting, that this Settlement of the said Rent was only in Trust for the Husband, and in the Deed there was not any Trust declared for the Wife, and that in truth she was a very lewd Woman and had eloped from her Husband, and he offer-

ing to take her again in his Answer: Lord *Chancellor* would make no Order in it, but only that the Defendant should stand in the Place of the Tenants, and should Admit the Rents payable by the Tenants to be still in being, and then she might proceed at Law and recover the Rents there if she could.

Cafe 51.

The King versus Carew.

The Court of *Chancery* has an Admiral Jurisdiction. Letters of *Reprisal* may be repealed in *Chancery* after a Peace, tho' there is a Clause in the Letters Patent, that no Treaty of Peace shall prejudice them.

THE Cafe was, that the Defendant *Carew* as Executor to *J. S.* being intitled to Letters of *Reprisal*, that were granted by the King to the Defendant's Testator for a great Sum of Money, (In which Letters Patents was a Clause that no Treaty of Peace should prejudice them,) and the King having by several Treaties of Peace with the *Dutch* expressly Articled, that they should not be Prejudiced by these Letters Patents; the Question was, Whether the King could by any Treaty of Peace *amortize* these Letters Patents, and so deprive the Party of the Interest that was thereby vested in him.

Mr. *Wallop* of Council with the Defendant insisted on time to argue it, being a weighty Point that might well bear a great Debate.

But the Lord *Chancellor* would not hear of it, saying; that the *Dutch* Ambassador never came into the King's Presence, but he was making fresh Complaints; and that it was a Cafe for which there could be nothing said, and that the Cafe was very proper in *Chancery* for the Repealing of these Letters Patents; For tho' the Bar were not so well apprised of it, yet the *Chancery* had Admiral Jurisdiction by the Statute of 31 H. 6. Num. 66. or 68. which was never printed. And in Proof that a Treaty of Peace might Revoke and *amortize* Letters of *Reprisal*, his Lordship said the same might be done by a Truce or by Letters of safe Conduct, and *a fortiori* by a Treaty of Peace: And that

it

it might be done by Letters of safe Conduct he cited the Statute of 11 H. 4. Rott. 66. and a Judgment of the like nature given in the Parliament of *France*, and the like Judgment given in the Parliament of *England*, 2 H. 5. Num. 34. And for an Authority that a Truce had the like effect upon Letters of *Reprisal*, he cited the Roll of Parliament 10 H. 6. Num. 34. where the *Danes* after a Truce made with them had seized *English* Ships by colour of Letters of *Reprisal*, there being no Provision made against them in the Truce, and the Parliament there petitioned the King for Letters of *Mart* against the *Danes*. *Vid. post. Case 116.*

The Attorney General on the behalf of Peter House College in Cambridge, &c. against the Margaret and Regius Professors in Cambridge, &c. Case 52.

THE Case was, a Man having devised 50 l. per Ann. for a Lecturer in *Polemical* or *Casistical* Divinity, so as he was a Batchelor or Doctor in Divinity, and Fifty Years of Age, and would read five Lectures every Term, and at the end of every Term would deliver fair Copies of the same to be kept in the University, and in default of such a Lecturer, he gave that 50 l. per Ann. to College in Oxon. Court refused to mitigate or alter the Terms, on which a Lectureship for reading in Polemical or Casistical Divinity in Cambridge, was founded.

Now upon this Information, the University of *Cambridge* with the Consent of the Heir at Law would have had the Rigour of the Qualifications mitigated, viz. That a Man of *Forty* Years of Age might be made Capable of this Salary, and that *Three* Lectures every Term might serve turn, and that if he delivered such fair Copies of his Lectures once a Year it should be sufficient.

But the Lord *Chancellor*, tho' no one made Opposition to it, refused to intermeddle in it; and said they should be held to the Letter of the Charity, and that the Heir had no Power to alter the Disposition made by his Ancestor.

D E

Term. S. Trinitatis,

34 Car' II. 1682.

IN CURIA CANCELLARIÆ.

Sir Tho. Harvey versus Ralph Mountague Ar'. Cafe 53.

2 Ch. Rep. 82

THE Cafe was thus. *Harvey* having by his Will appointed the Lady *Harvey* and Sir *Tho. Harvey* Executors: By a former Decree the Lady *Harvey* was to receive no more of the Estate, and Sir *Tho. Harvey* to have a Perpetual Injunction against her, and a Clause was inserted in the Decretal Order, that no Creditor should pay her any more Money.

The Defendant having Notice of a Decree, to which he was no Party, pays Money contrary to that Decree. Ordered that he should pay the Money over again.

Vol. post. Cafe
113.

The Testator had a Mortgage for 10000*l.* on part of Mr. *Mountague's* Estate. And Mr. *Mountague*, after notice of this Decree (he being present at the Hearing, &c.) but before any Sequestration against the Lady *Harvey*, pays in this 10000*l.* and Interest to the Lady *Harvey*, and has his Mortgage delivered up to be Cancelled: And now a Bill was brought against him by Sir *Tho. Harvey*, to compel a Repayment of this Money.

It was insisted, that it was a very hard Demand in Equity to have the same Money twice paid, he having in this Cafe paid it to a Hand that by Law was impowered to receive it, and to her who had his Securities in her Hand; and the Notice, that they pretend of the Decree, is not any

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legal Notice : But regularly he ought to have been made a Party to the former Suit, in which the Lady *Harvey* was Decreed not to Intermeddle with the Estate, or at least to have been served with an Order not to have paid the Money to the Lady *Harvey*.

But on Behalf of the Plaintiff it was Answered, That this was full Notice to Mr. *Mountague*, and a pure Voluntary Payment in him on purpose to prevent and avoid the Decree of this Court.

Cafe 54.

Burdett versus Rockey.

A Sequestration which Issues as meſn Proceſs, determines by the Death of the Party. Otherwiſe, if it iſſues after a Decree, tho' for a Perſonal Duty.

A Sequeſtration, that Issues as meſn Proceſs of the Court, will be diſcontinued, and determined by the Death of the Party : But where a Sequeſtration Issues in Purſuance of a Decree, and to Compel the Execution of it, there tho' the ſame be for a Perſonal Duty, it ſhall not be determined by the Death of the Party.

It was Objected, that it was but for a Contempt that a Sequeſtration Issues, and that the Principal Intent thereof is to bring the Party to a Compliance, and not to levy the Duty ; tho' *that* be Collaterally done.

A Sequeſtration binds from the time of awarding the Commiſſion, and not only from the time of Executing it.

Lord *Chancellor*, The Sequeſtration binds from the very time of awarding the Commiſſion, and not only from the time of Executing of it and its being laid on by the Commiſſioners : For if that ſhould be admitted, then the Inferior Officer would have *ligandi & non ligandi poteſtatem*.

Cafe 55.

Strode verſus Little.

Bill for an Account of the Profits of *Mendippe* Mines. Defendant

ON a Demurrer and Plea to a Bill to have an Account of the Profits of the *Mendippe* Mines in *Somerſetſhire* ; They plead a Special Act of Parliament which had given

given Jurisdiction of all Matters arising within the Mines to the Courts of Exclusive of all other Jurisdiction: And it was urged that this was like to the Jurisdiction of the Sewers, where this Court could not Intermeddle: But it was Answered it was not like that Case; because there was a new Jurisdiction created and reserved intire within it self: But here the Jurisdiction of determining Matters relating to these Mines is transferred to the Courts of which were ancient Courts, in which by the Common Law this Court did interpose in Equitable Matters.

pleads an Act of Parliament, which had given an Exclusive Jurisdiction of all Matters arising within the Mines to the Courts of A, but had not averred there was a Court of Equity there. Plea over-ruled.

Lord *Chancellor*, The Plea is not good, because altho' you plead an Exclusive Jurisdiction, yet you do not aver that there is any Court of Equity there.

Anonimus.

Case 56.

ON a Demurrer. Resolved: that where a Man Exhibits a Bill for Discovery of a Deed, and prays in his Bill a Discovery only, there a Man must make Oath he hath lost the Deed. But where a Man comes, and sets forth the Loss of his Deed, and prays to be relieved touching the Duty coming to him by the Deed, there he needs not make such Affidavit.

In what Case a Man must make Oath of the Loss of a Deed, where he brings a Bill touching this Deed.

Vid. post. Case 175 & 241. 1 Ch. Rep. //

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Term. S. Michaelis,

34 Car' II. 1682.

In CURIA CANCELLARIÆ.

Case 57.

Anonimus.

If the Executor
of a Parson
brings a Bill for
Tythes, he need
not offer to ac-
cept the Single
Value, he not
being intituled by
the Statute of
Edw. 6. to the
treble Value.

UPON a Demurrer: a Man having brought a Bill for Tythes, the Defendant demurred, for that he had not offered by his Bill to accept of the single Value, and yet had alledged in the Bill, that the Defendant had carried away the Corn, &c. without setting forth the Tythes according to the Statute; and it was insisted for the Defendant, that if he should be put to answer this Bill, the Plaintiff would presently go to Law, and give his Answer in Evidence, and recover the treble Value of the Tythes; and a Court of Equity ought not to assist a Man in recovering a Penalty, nor compel a Discovery of a Forfeiture.

Afterwards at another Day upon a Motion this Demurrer was over-ruled, the Plaintiff in this Case being only the Executor of a Parson, and not the Parson himself, and so not intituled to a Forfeiture upon the Statute.

Case 58.

Bovey versus Smith.

2 Ch. Rep. 124.

Trustee sells
the Land to
one, who had

A Trustee having sold the Land to a Stranger, that had no Notice of the Trust, and a Fine with Proclama-

clamations and five Years past, the Trustee afterwards, for valuable Consideration really paid, purchases these Lands again of the Vendee. And it was Decreed by the Lord Chancellor, with the concurring Opinion of the Lord Chief Justice North, That the Trustee, notwithstanding the Fine, Proclamations and Non-claim for five Years, should stand seized in Trust as at first, as if the Land had never been sold, nor any Fine levied.

no Notice of the Trust, and after a Fine and Five Years non claim repurchases the Land. Decreed he should stand seized in Trust, as before the Sale.
Vid. post. Case 74 & 139.

Jenks versus Holford.

Case 59.

THE Plaintiff Exhibited his Bill, setting forth, that his Wife's Father was a Citizen of *London*, and that he had not Advanced her in his Life-time, and demanded her Customary Part, and prayed an Account.

Sums of Money given by a Freeman of *London* to a Daughter, if not given as a Marriage Portion, or in pursuance of a Marriage Agreement, no Advancement; but however must be Cast into *Hotch-pot*.

In this Case the Points insisted on were: *First*, That the Plaintiff's Wife was Advanced by her Father in his Life-time, he having given her *Four hundred Pounds*. But the Lord Chancellor was of Opinion, that it could not be any Advancement, unless it had been given her as a Marriage Portion, or in Pursuance of a Marriage Agreement; and the *Four hundred Pounds* were not given till a long time after her Marriage, and without any Agreement that the same should be for her Marriage Portion, and was a free Gift; great part of the Sums that made up the *Four hundred Pounds* being given her at Christenings and Lyings-in.

Secondly, It was insisted on by the Defendant's Council, that these several Sums, howsoever given, ought, if the Plaintiff will come in for his Wife's Customary Part, be cast into *Hotch-pot*; But the Plaintiff's Council denied it, and took a difference betwixt a free Gift subsequent to the Marriage, and where the same is given in Marriage; and compared it to the Case of an Heiress, where she has Lands given her in *Frank Marriage*, those must be cast into *Hotch-pot*; but otherwise if it is of Lands conveyed or given to her

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by

by her Father or other Ancestor after the Marriage. *Sed non allocatur.*

The *Third* Point was, that the Plaintiff's Wife's Father having been a great Chymist and spent great part of his Estate in that Study, he had (as was pretended) arrived to great Knowledge therein, and had a little before his Death given several Receipts to the Defendant *Holford*, (who had married his other Daughter,) to a very great Value, as the Plaintiff pretended, and alledged that the Defendant made 500 *l. per. Ann.* certain Profit of the same; and to incline the Court to think they were of such Value, the Plaintiff offered to give the Defendant 500 *l.* for his Interest in the said Receipts; and therefore insisted, that these Receipts ought to be looked upon as part of his Personal Estate, and that the Defendant should account for the same.

But Mr. *Solicitor General*, and Mr. *Keck*, of the Defendant's Council replied, It was a Scandal upon the Custom of the City of *London* to make such Receipts and Trifles part of a Citizen's Estate, especially such Receipts as these, which for ought appears are only to make Strong Water; and they desired to know how they should come to be reckoned part of a Citizen's personal Estate: For suppose he had communicated the Receipts to the Defendant by word of Mouth, and he had writ them down in his own Paper, there had then been no Colour for it; But now this Scrap of Paper must be reckoned Part of his personal Estate; and if they will have an Account for so much Wast Paper, they may take it: And suppose the Defendant had published and made common these his Choice Receipts, what would then have become of the Property? and how then would they have belonged to a Citizen's Personal Estate? And this he might have done, and may do, without Injury to any Man: And it is not like a new Invention, for which a Man has a Patent, that none but himself for the space of so many Years shall use the same; that

that may vest a Property; but in this Case there is no Colour for it.

Lord *Chancellor*. I will not so far Countenance these kind of Receipts (which is only a Piece of Quackery, and serves only to cheat the People) as to put a Value on them in *Chancery*. For ought I know, a Receipt to make Mince-Pies or catch Rats may be as valuable. And the Plaintiff not consenting to cast into *Hotch-pot* the four hundred Pounds given unto his Wife as aforesaid, the Bill was dismissed.

Chymical Receipts not to be reckoned part of a Free-man's personal Estate.

Girling versus Lee.

Case 60.

GREAT part of the Lands in Question had been settled on the Lady *Lowther* for a Jointure by Mr. *Lee* her late Husband, Father of the Defendant; and in the Settlement *Lee* covenants that the Lands were of the annual Value of 800 *l.* and in case they should fall short of that Value that his other Estate should be liable to supply the Defect thereof.

Where an Equity of Redemption or Trust-Estate is devised for payment of Debts, all Debts shall be paid equally. Otherwise, if the Devise is to the Executor, for then the Lands will be legal Assets.

After the making this Settlement, all the other Estate of *Lee* not comprehended in the said Jointure was mortgaged for 2400 *l.* and afterwards *Lee* acknowledges a Judgment to the Plaintiff, who had wrought for him as his Taylor, and became bound with him in several Bonds; but the Judgment was defeazanced on Payment of 550 *l.* *Lee* makes his Will, and devises all his Lands for Payment of Debts.

The Bill was to have the Trust performed, and the Plaintiff's Debt satisfied. The Defendant in his Answer confessed the Devise for Payment of Debts, but sets forth the Jointure and Covenant and the Mortgage.

It was insisted by Mr. *Solicitor General* and others of the Defendant's Council, that this Covenant bound the Land,

Land, and was precedent to the Judgment, as was also the Mortgage, and that both these must be satisfied before the Plaintiff's Judgment; or at least the Lands being in Mortgage when the Judgment was acknowledged, the Plaintiff could come in but for an Average and his Proportion; in regard his Judgment could not in Law affect these Lands, they being then in Mortgage; so that it was a Security in Equity only: and they insisted, that the Covenant for making up the Jointure ought to be first satisfied, it being expressly charged upon the Land; and they cited a Case where a Man Covenanted to settle 500 *l. per Ann.* Jointure, and named no Lands in particular, yet there it was held, that the Lands were bound, and that even against a Purchaser; and that if he had afterwards acknowledged any Statute or Judgment, yet this Covenant should be looked upon as a Prior Incumbrance, and was so Decreed.

But it was Answered by Mr. *Keck*, being of the Plaintiff's Council, that true it is, where a Man Covenants in General to settle Lands of such a Value, and names none, there all the Lands shall be bound; But where a Man settles such and such Lands in particular for a Jointure, and afterwards Covenants that they are of such a Value; there such Covenant binds the Person only and not the Land; But this Case indeed was stronger, and did express that the other Estate should stand Charged to make the Jointure of that Value: But then he observed, that it was more than forty Years since the Jointure took place, and that in all this time there had been no Demand on pretence of Defect in the Value of the Jointure; and that the Defendant had actually paid other Debts on Bond; so that these Pretences carried the face of Fraud with them, and seemed only to be set on foot to fence against this poor Man's Debt, who had been *Lee's* Taylor and Bonds-man. And as to the Objection of Average, he did admit, that generally where Lands are devised for Payment of Debts, there all sorts of Securities, whether Statutes, Judgments, Bonds or simple Contract Debts, if they do not in their own nature affect

affect the very Land so devised (as a Judgment cannot, if the Land be then in Mortgage or the like) there all Debts shall be paid in Proportion and by Average; and so of other Equitable Incumbrances: But then there is this Difference, If the Devisee of the Lands in Trust for Payment of Debts be also made Executor, then do the Lands so devised become legal Assets; and then Debts must be paid according to their Precedency or Superiority at Common Law: and so it was resolved in the Case of *Hixine* and *Mortly*, which was agreed to be Law of all sides; and this Case being so, it was Decreed that the Lands should be sold according to the Trust in the Defendant's Father's Will for Payment of Debts, and the Plaintiff be let in for a Satisfaction of his Judgment, without regard had to the Covenant for making good the Jointure.

Peiton versus Banks.

Case 61.

A Man by Will devises Lands to his Wife for Life, and as to the said Lands he gives the Reversion to *A.* and *B.* to be equally divided betwixt them.

Devise to *A.* for Life, the Reversion to *B.* and *C.* to be equally divided betwixt them. *B.* and *C.* Tenants in Common for Life only.

The Question was, what Estate *A.* and *B.* should take by this Devise.

Decreed, they were Tenants in Common for Life only.

Serjeant *Maynard* (tho' not of Council in the Case) told us at the Bar, he remembered the like but a stronger Case so resolved above twenty Years since. *viz.* A Man having given Lands to his Wife for Life, devises the Reversion to *A.* and *B.* *A.* in that Case being his Heir at Law: yet adjudged, that by the Devise *B.* took an Estate for Life only.

2 Ro. Abr. 834
Ca. 13.

Case 62.

Frankland verſus Hampden.

Forged Deeds
or Writings not
to be ordered
per Cur' to be
torn or defaced,
but kept ſo,
that the King
may proceed
thereon againſt
the Criminal.

TH E Plaintiff this day making Default, and upon Opening of the Cauſe it appearing that the Plaintiff had Forged ſeveral Notes or Writings in the Defendant's Name; it was prayed by the Defendant's Council, that ſuch Bills or Notes might be torn or obliterated: But Mr. *Solicitor General* obſerved to the Court, that a Forged Deed or Writing cannot be torn or defaced by Law, but muſt be kept ſo, that the King may proceed upon it againſt the Criminal.

Case 63.

Gibſon & Ux' verſus Kinven & al'.

Perſonal Eſtate
Deviſed to the
Wife, upon
Truſt not to
diſpoſe thereof
but for the
Benefit of her
Children. She
by Will gives
ſs. only to one
Child.
Decreed the E-
ſtate to be
divided Equally.

TH E Caſe was, that one *Harris* in his Life-time being poſſeſſed of a conſiderable Perſonal Eſtate, and having Iſſue four Children, *viz.* two Sons and two Daughters, and *Mary* one of his Daughters being now married to the Plaintiff *Gibſon*, and *Ann* his other Daughter to the Defendant *Kinven*, he made his laſt Will and Teſtament in Writing, and thereby Deviſed ſeveral Particular Legacies to each of his Children, and gave his ready Mony, Goods, Plate and Houſehold Stuff to his Wife, upon Truſt and Confidence that ſhe would not diſpoſe thereof but for the Benefit of her Children.

The Wife after the Death of her Husband made her Will, and therein calling herſelf his Executrix and reſiduary Legatee, ſhe gives ſeveral Legacies to ſome of her Children, and but ſs. only to the Plaintiff and her Children, and Deviſes all the reſt of her Eſtate to her Son *Bartholomew*.

The Bill was to be relieved herein, the Plaintiff inſiſting that the Wife having Deviſed all this Eſtate to one of her Children

Children *only*, this was a void Bequest, and a Breach of her Trust, and that therefore the Plaintiffs ought to be let in to a full third part of the said Father's Estate intrusted with the Mother as aforesaid; one of the said Brothers after the making of the said Father's Will dying in his Life-time.

The Defendants by Answer confessed the Will of *Harris* the Father, and did admit that one of the Brothers was dead in his Life-time; But set forth further that the Plaintiff had by some means disoblged her Mother in her Life-time: And tho' they had endeavoured to reconcile them, and to perswade the Mother to leave the Plaintiff her Daughter a better Legacy, yet they could not prevail with her to do it. And further say, that about three Months since, to prevent Disputes there was a Case touching this matter drawn up, and agreed to by the Plaintiffs, and referred to Sir *Francis Pemberton*, now Lord *Chief Justice* of *England*, to determine, who gave it as his Opinion, that, notwithstanding the Words in the Will, *viz. upon Trust and Confidence that she will not dispose thereof but for the Benefit of her Children*, yet that the Executrix had Power to dispose of the Residue to which of her Children she would, and that she was not bound thereby to divide it equally; and that if she had given the Plaintiff her Daughter but a Ring only, it had been good.

After this Cause had been much debated, and several Precedents produced, where in such Cases very unequal Distributions had been approved and ratified by this Court, the Lord *Chancellor* decreed for the Plaintiff; for that the Distribution in this Case was so very unequal, and that without any good Reason shewn to warrant it: and therefore he thought fit to rectifie it in this Case, and could not do it otherwise than by decreeing an equal Distribution.

Case 64.

Vermuden versus Read.

4000 l. Portion
by Marriage Ar-
ticles secured
on Land; pro-
vided if the
Husband did
not settle a
Jointure within
two Years, he
should have
the Interest
only for his life,
and the Land
to go to the
Wife and the
Heirs of her Bo-
dy.
The Wife dies
within the two
Years, no Set-
tlement being
made.
Husband not
intitled to the
Portion.
Vid. post. Case
160.

SIR *Compton Read* married his Daughter to the Complainant, and for securing the Payment of 4000 l. the Daughter's Portion, did enter into Articles, that the Moiety of a certain Manor of his should stand charged with it: But it was provided in the Articles, that in case Mr. *Vermuden* did not settle upon his Lady within two Years such a Jointure, as by the Articles was agreed to be settled, that then the Complainant should have only Interest paid him for his Wife's Portion, after the Rate of 50 s. per Cent. during his Life, and after his Decease the Lands should go to his Wife and the Heirs of her Body, with a Power of Redemption to Sir *Compton Read* and his Heirs. Sir *Compton Read* dies; and the Complainant's Wife dies within the two Years, he not having settled such Jointure, as by the Articles he was obliged to settle.

The Plaintiff the Husband exhibited his Bill against the Heir at Law of Sir *Compton Read*, to be relieved against these Articles; And it was alledged on behalf of the Complainant, that the Estate tail being limited to his Wife, she might by a Fine levied in her Life-time have barred this Estate tail, and might have suffered a Common Recovery of it, and by that means have barred the Remainder man; and that if he had at any time settled such Jointure upon his Wife, tho' not within the time prescribed by the Articles, he should have been relieved against these Articles, and have had the Portion decreed him.

It was demanded by the Lord *Chancellor*, whether they prayed Relief against the Person, or endeavoured to charge the Land. If they went against the Land, they must take it *secundum formam Chartæ*; and in this Case there being
no

no Personal Covenant, the Bill was dismissed: and it was said to be like the Case of *Colonel Cheeke and my Lord* Where *Cheeke* by Articles made on his Marriage was to have 4000*l.* Portion with his Wife; 1500*l.* paid down in hand, and 2500*l.* more, if he made a Settlement within the space of *three* Years. It happened that his Lady died within *two* Months after the Marriage, he not having in that time made such Settlement as by the Marriage Articles he was obliged to have made: and he in that Case exhibited a Bill to be relieved, and was dismissed.

Q. if the Husband's making the Settlement be not a Condition Precedent to the Payment of the Portion.

Brent versus Best & al'.

Case 65.

THE Plaintiff exhibited his Bill to redeem. The Case fell out to be, that one *Jo. Combes* being seized of the Copyhold Lands in Question, and having taken up Money upon them, and secured the Repayment of the same by several Mortgages made of the said Lands, he afterwards surrendered them to the Use of his last Will (which he needed not to have done, for having only an Equity of Redemption he might have devised them without the Formality of any such Surrender) and thereby devised them to one *Yeates* in Trust in the first Place to pay off and discharge the Mortgages on the said Lands, and in the next Place for Payment of several Legacies, and particularly a Legacy of 200*l.* unto the Complainant's Wife; the Remainder in Fee to *Yeates*; and makes *Yeates* his Executor. *Yeates* proves the Will, and pays several Debts owing by his Testator, that were not Mortgage Debts; and to raise Money for that purpose makes several new Mortgages of the Lands in Question.

Devise of Lands in trust to pay Mortgages in the first Place, and then Legacies, is made Executor. He mortgages to raise Money to pay other Debts of the Testator.

Such new Mortgage shall take Place of the Legacies.

The Plaintiff being a Legatee in right of his Wife, exhibited his Bill for Satisfaction of his Wife's Legacy, and insisted that after the Mortgages made by *Combes* were discharged, the Lands then should stand charged with his Legacy, and that then he ought to be let into an Imme-

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diate Satisfaction thereof, and not be postponed by the new Mortgages made by *Yeates*.

But by the Defendant's Council it was insisted, that the Plaintiff could not be admitted to redeem part, without redeeming the whole. And the Land stands charged as well with the Mortgages made by *Yeates*, as with those made by *Combes*; and in this Case *Combes* was not only a Trustee for Payment of Debts, but also Executor to the Devisee, and so the Lands in his hands became legal Assets, and charged with all the Debts of the Testator, and by consequence with the new Mortgages made by *Yeates*, the Money having been raised and applied for Payment of the Debts of the Testator.

But it was replied, *that* was so, where a General Trust is raised for Payment of all Debts, but in this Case *Yeates* was a special Trustee, and directed by the Will to pay off the Mortgages, and then the Legacies, and no Provision was made for other Debts. *Sed non allocatur.*

Mortgagee in Fee devised the mortgaged Lands to A. for Life, Remainder to B. in fee. A. shall have one third and B. two thirds of the Mortgage money.

In this Case *Combes* having mortgaged part of his Copyhold Lands in Fee, being Customary Lands of Inheritance, unto one *Best*: *Best* surrenders them to the use of his Will, and devises to his Wife for Life, Remainder in Fee to the Defendant *Barnaisb*, and makes his Wife Executrix; and it was prayed on his behalf, that if the Plaintiff redeemed, the Defendant *Barnaisb* might have a proportionable share of the Redemption-money, according to the Value of the Estate he had in the Land: And the matter in fact appearing to be so upon the Pleadings, altho' the Defendant had no Cross Bill for that purpose, nor so much as insisted upon it in his Answer, it was ordered by the Lord Chancellor, that the Defendant *Barnaisb* should have his Proportionable Part of the Redemption-money. And the ordinary Rule of the Court in such Case was said to be, that one third of the Money should be paid to the Tenant for life, and the two thirds residue to the Remainder Man.

Fer-

Ferrars verſus Ferrars.

Cafe 66.

A Bill was exhibited to be relieved againſt an Action at Law; and upon a Motion for an Injunction, the Cafe appeared to be:

The Lady *Ferrars*, the Defendant, lived ſeparate from her Husband, and had a ſeparate Maintenance allowed her by her Husband, and took a Houſe in *London*, and bought Goods and other Furniture of the Plaintiff at Law, for Furniſhing of the ſaid Houſe: And now the Executors of her Husband, being ſued at Law for theſe Goods bought by her, whiſt ſhe lived apart from her Husband, and had a ſeparate Maintenance (which was, as the Plaintiffs Council alledged, well known to the Plaintiff at Law, of whom ſhe bought theſe Goods) brought their Bill in Equity to be reliev'd againſt this Action, inſiſting that the Plaintiff's at Law ought not to charge the Husband or his Executors for theſe Goods.

The Husband's Executors are ſued at Law for Goods bought by the Wife in her Husband's Life-time, while ſhe lived ſeparate, and had a ſeparate Maintenance, and this known to the Tradeſman that ſold the Goods. Bill brought for Relief. Injunction deny'd, it being a proper Defence at Law.

But the Equity not being confeſſed by Answer, the Defendants ſwearing that the Wife's living ſeparate was with her Husband's good liking and by his Direction; and that they (the Defendants) hoped to prove that ſhe was directed by her ſaid Husband to buy theſe Goods, and that he declared he would pay for them:

Upon hearing Council on both ſides an Injunction was denied, it being after a Verdict, and for that the Plaintiff's Bill contained no Equity; and their Allegations, if true, would have been a proper Defence at Law.

In debating this Matter was cited *Scot* and *Manby's* Cafe. ^{1 Sid. Rep. 159.}

Case 67.

Farrington versus Chute & Ux'.

Bill for an Account of a Copartnership. Defendant Pleaded an Award, averring the Matter in Question comprehended in the Award. Plaintiff replied Generally to the Plea; and tho' the Plaintiff ought to have set down the Plea to be argued, and not to have replied to it, yet Court Decreed Defendant to Account. But afterwards, tho' this Decree was Sign'd and Inroll'd, Court order'd Defendant only to Answer over.

THE Plaintiff's Bill being to have an Account of a Trade in Copartnership between his Testator and one *Baker*, the Defendant *Chute's* Wife's former Husband; which ended about twenty Years since:

The Defendant pleaded an Award in Bar, and Averred, that the Matter in Question was Comprehended in the Award.

The Plaintiff replied Generally, that there was no such Award.

This Cause had been twice heard upon the Plea, and each time the Plea adjudged against the Defendant by the Lord *Chancellor*, he conceiving the Plaintiff's present Demand, by reason of an Exception in the Award, not to be therein comprehended, and directed the Defendant to Account.

It was this day moved by Mr. *Keck*, that the Plaintiff in strictness had concluded himself, and by the Forms of the Court was ousted of his Demand; For having replied Generally to the Plea, that there was no such Award, this admitted the Plea to be a full Bar, if the same were proved to be true; and the Plaintiff must take it as the Defendant has Pleaded it, with the Averment, that the Matter in Question is comprehended in the Award, so that in strictness the Plaintiff was concluded, and the Defendant had nothing more to do, but only to prove, that there was such an Award: However he declared, they were willing to relinquish this Advantage, altho' he cited a Case in Point, where a very honest and equitable Demand was lost upon this very thing, and tho' it was a Case of Extremity, the Plaintiff there could never get over it; but it was ruled against him upon long and great Debate. But then if the

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Defendant waved this Advantage, he must not be in a worse Condition for the Plaintiff's Mistake, who ought to have replied Specially, that the Matter in Question was not Comprehended in the Award; and then the Defendant had been at Liberty to Corroborate his Plea by Proof, which he was now ousted of; And that in truth there ought to have been in this Case, upon the over-ruling of the Plea, a *Respondeas ouster* awarded, and not an Account immediately directed; And therefore insisted that the Defendant might be at Liberty to Answer, or that the Cause might be reheard (which indeed was the only Point aimed at)

But Mr. *Solicitor General* for the Plaintiff answered, that upon the General Replication it was not to be taken that no Award at all was made, but that there was no such Award as the Defendant had pleaded, including the Plaintiff's Demand; and the Defendant had failed in producing any such Award, his Lordship having adjudged that the Award by them produced on hearing of the Plea did not include the Trade of which the Plaintiff demanded an Account. And Sir *Jo. Churchill* insisted, that where a Man pleads in Abatement only, there indeed upon the over-ruling of his Plea only a *Respondeas ouster* shall be awarded: But where a Man pleads a Plea in Bar, as in this Case, the same is peremptory.

The Result of the Debate was, that the Defendant should answer, and be at Liberty to Corroborate the Matter of his Plea by Proof.

Anonimus.

Case 68.

UPON a Motion, the Lord *Chancellor* declared, that if a Man Sued in Chancery, and pending the Suit here, the Statute of Limitations attached on his Demand, and his Bill was afterwards dismissed, as being a Matter

Statute of Limitations attaches the Demand pending a Suit in Equity for the same. Court of Equi-

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ty won't suffer the Statute of Limitations in such Cafe to be pleaded at Law.

properly determinable at common Law; in such Cafe his Lordship would take care to preserve the Plaintiff's Right, and would not suffer the Statute to be pleaded in Bar to his Demand.

Cafe 69. *Charles West, Arm'*; versus Lord *Delaware* and Sir *Jo. Cutler*.

Two Defendants to a Bill: one of them puts in an insufficient Answer, which is so reported, and on Exceptions to Master's Report confirm'd. Afterwards the other Defendant puts in the like insufficient Answer. Court for avoiding delay will judge on the Insufficiency of this Answer, without sending it to a Master.

THE Plaintiff being the Lord *Delaware's* eldest Son, exhibited a Bill to be relieved touching some Articles made on his Marriage, his Father having received nine thousand Pounds of his Wife's Portion, and yet refused to make any Settlement, but took Advantage of a Defect in the Marriage Articles; and in order to be relieved thereon, pray'd a Discovery of the Incumbrances on his Father's Estate agreed to be settled on the Marriage.

Sir *Jo. Cutler* had formerly Answered, that the Plaintiff by the Articles made on his Marriage had no Title to the Estate in Question, and therefore insisted he was not bound to discover the Incumbrances.

Upon Exceptions taken to this Answer, the Master reported the Answer insufficient; and upon Exceptions taken to the Report, the Report was confirm'd by the Lord *Chancellor*, who ordered that the Defendant should answer as to the Incumbrances.

After this, Lord *Delaware* put in just such another Answer, and insisted upon the same Matter.

The Plaintiff, to avoid delay, fought by the Defendants (instead of excepting to the Lord *Delaware's* Answer, and getting a Report upon it, and then waiting for Exceptions to the Report, and bringing those on before the Court for Judgment, as the Plaintiff had before done with Sir *Jo. Cutler's*

Cutler's Answer) Petitioned the Lord Chancellor, that the Matter might be immediately brought before him for his Judgment on the Insufficiency of this Answer, which was put in purely for Delay; and the Petition having been granted, it was now moved to discharge that Order, alledging, that it introduced a new form in the Court, and it must needs bring great and unnecessary Trouble on his Lordship, and many other Inconveniences, not now foreseen, might ensue upon it; and by this means *Masters in Chancery* would in a great measure become uselefs: And the Course of the Court is the Law of the Court; and that is the Law of the Land, and ought not to be varied or changed for any Man's particular Conveniency. *Sed non allocatur*; and the Lord Chancellor declared, he would without more ado be attended in this Matter.

Comes Arglasse versus Muschamp.

Case 70.

THE Plaintiff having exhibited his Bill to be relieved against the Grant of an Annuity or Rent-charge of 300 l. per Ann. charged upon his Lands in Ireland, setting forth that the said Grant was obtained from the late Earl of Arglasse by the Defendant Muschamp, upon a fraudulent Practice here in London: The Defendant pleaded to the Jurisdiction of the Court, that the Lands lying in Ireland, the Matter was properly examinable in the Court of Chancery there, and that this Court ought not to interpose; Mr. Wallop and others of the Defendant's Council arguing, that tho' in extraordinary Cases the Chancery here might have a Jurisdiction of Matters in Ireland, yet in ordinary Cases it had not; and in Case of Contracts made in London, an Irish Man's being occasionally here, would not intitle this Court to a Jurisdiction, and cited the Doctors of the Civil Law, who treat of Jurisdiction in point of Residence arising only where a Man commonly inhabits, and where he may be said to have his *Domicil*; and that undoubtedly the Chancery of Ireland had a Jurisdiction in this

Court of Equity in England will relieve against fraudulent Conveyances gain'd of Lands in Ireland, when Defendant is in England.

Vid. post. Case 125.

this Case, the Lands concerning which the Litigation arises lying there: And though all Equity is founded upon general Reason, and so all Laws are said to be founded upon Reason, yet Reason doth diversifie itself into several Laws in each Kingdom, which are made conformable *quoad hic & nunc*; and so it comes to pass, that the municipal Laws of all Countries and Kingdoms differ; and if this Court should assume a Jurisdiction in this Matter, the Chancery of *Ireland*, and with greater Reason, might do the like; the Consequence whereof would be, that upon the difference of the Laws of each Nation, different Decrees would be made, and so the Jurisdictions might clash, and their Decrees be repugnant, and the Defendant prosecuted in each Court for the same Matter, and yet not able to comply with both: And it's an Argument, that this Court has not a Jurisdiction in this Case, because it is deficient in Power, as this Case is, to execute its own Decrees, for this Court cannot award a Sequestration against Lands in *Ireland*.

But for the Plaintiff it was answered, that the primary Jurisdiction of this Court is to relieve against Frauds and Cheats, and the Fraud by the Bill charged arises here, and if the Laws of *Ireland* so far differ from the Laws here, (which they hoped they did not,) as to allow of a Fraud or Cheat, this Court had then the greater Reason to retain this Cause, and see Justice done. And there could be no fear of different Decrees, for it would be a good Plea there, that this Court was possessed of the Cause, and had decreed in it. And as now they endeavour to oust this Court of its Jurisdiction, because the Lands lye in *Ireland*, they might much better plead there, that the Fraud arose in *England*. And as to what was objected, that this Court had not Power in this Case to compel an Execution of its Decree, which if admitted, were the Unhappiness of the Suitors only, and could be no Grievance to the Defendant; yet they would in this Case content themselves with the Defendant's Person, in case no Sequestration was to be had.

Lord

Lord *Chancellor*. This is surely only a Jest put upon the Jurisdiction of this Court by the Common Lawyers; for when you go about to bind the Lands, and grant a Sequestration to execute a Decree, then they readily tell you, that the Authority of this Court is only to regulate a Man's Conscience, and ought not to affect the Estate, but that this Court must *agere in Personam* only; And when, as in this Case, you prosecute the Person for a Fraud, they tell you, you must not intermeddle here, because the Fraud, tho' committed here, concerns Lands that lie in *Ireland*, which makes the Jurisdiction Local; and so would wholly elude the Jurisdiction of this Court. But certainly they forget the Case of *Archer* and *Preslon*; in which Case, if in any, the Jurisdiction was Local, the matter there being not only for Land that lay in *Ireland*, but of a Title under the Act of Settlement there; yet the Defendant coming into *England*, a Bill was exhibited against him here, and a *ne exeat regno* granted, and he put to answer a Contract made for those Lands; and when he departed into *Ireland* without answering, he was sent for over by a special Order from the *King*, and made to answer the Contempt, and to abide the Justice of this Court; for the *King* will maintain the Authority of his Courts, when they act according to Law and Reason.

The Plea was over-ruled, and the Defendant ordered to pay Costs for endeavouring to oust the Court of its Jurisdiction.

Vid. the Case of
Lord Kildare
and Sir Morrice
Eustace.
2 Ch. Rep.
188.

Wilcox versus Sturt.

Case 71.

UPON a Plea, The Bill was to be relieved for a sum of Money secured to the Plaintiff by a Mortgage, and for which Bonds were also given by the Defendant.

Defendant
pleads that the
Plaintiff in E-
quity brought
an Action at
Law for the
thing in Questi-
on, and on full
Evidence was
non-suited.

As to the Bonds, the Defendant by way of Answer set forth, that the same were delivered by the Defendant

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as

as *Escrows* only for the Plaintiff's Use, to be delivered over to the Plaintiff, upon the Plaintiff's giving a Release, which he refused to do. And the Defendant pleaded that the Plaintiff upon full Evidence was nonsuited in an Action of Trover brought at Law for those Bonds.

It was urged by the Plaintiff's Council that a Non-suit was a new sort of Plea, and it was no Bar even at Law, much less ought it to be so taken in Equity, and it looks odd, that when the Plaintiff comes and complains that he has no Remedy at Law, the Defendant should tell the Plaintiff, that the Plaintiff is without Remedy at Law, and therefore he shall not be relieved in Equity: And if Non-suits, which often happen upon trivial Mistakes, and many times upon Accidents, should be admitted as Bars in Equity, it will make an End of a great many Cases.

As to the Validity of the Plea no certain Rule was given: But Lord *Chancellor* said, in this Case you shall have no Decree for the Duty on the Bond as upon Bonds lost or torn; But you shall be at liberty to give the Bonds in Evidence to prove the Debt secured by Mortgage. In which Rule each Side seemed to acquiesce.

Case 72.

Durdant versus Redman.

Where a Defendant has demurred, he may assign another Cause of Demurrer at the Bar, paying Costs, and if such Cause of Demurrer is over-ruled, he ought to pay double Costs.

But when a Defendant has pleaded, and there is no Demurrer in Court, he can't demur at the Bar, tho' he would pay Costs.

IN this Case the Defendant having pleaded a frivolous Plea, Mr. *Steadman* of Council with the Defendant offered to demur at the Bar for want of Parties.

But Mr. *Keck* of Council for the Plaintiff insisted, that if he would demur at the Bar, he must by the Rules of the Court pay Costs before he be heard; which Mr. *Steadman* consenting to, he went on and opened his Demurrer, and shewed a sufficient Cause of Demurrer.

But then Mr. *Keck* told him, his Demurrer could not be received, for that a Man cannot demur at the Bar,

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unless there be a Demurrer in Court, and in this Case the Defendant had Pleaded only; and thereupon the Plea was over-ruled, and the Demurrer disallowed: And in strictness the Defendant ought to have paid double Costs.

Alexander Popham versus Bampfeild & al. Case 73.

13 Novembris
1682.

In Court.

1. Salk. 236.

THE Case upon the Pleadings appeared to be thus: One Rogers, who had married his Neice to the Plaintiff's Father, being seized in Fee of Lands of the Value of 1500 *l. per Ann.* devised those Lands to the Defendant *Bampfeild* and others for the Payment of his Debts, and after his Debts paid, then in Trust for the use and benefit of the Plaintiff and his Heirs Male; but declared his Will to be, that the Plaintiff should have no benefit of this Devise, unless Sir *Francis Popham*, the Plaintiff's Father, should settle upon the Plaintiff two full thirds of his Estate settled on the said Father on his Marriage, and in default thereof, Devise the said Estate to his Trustees; or in Case the said Sir *Francis* should make such Settlement, yet then, if the Plaintiff should happen to die without Issue, in such Case likewise he gave the said Estate to his Trustees, discharged of the Trust for the Plaintiff.

Devise of Lands to Trustees to the use of Plaintiff and his Heirs Male, in case Plaintiff's Father settle 2 thirds of the Estate which was settled on Plaintiff's Father on his Marriage, and in default thereof, or in case of Plaintiff's Death without Issue, Trustees to hold the Lands to their own use.

Plaintiff's Father per Will devises all his Lands, being 6000 *l. per Ann.* charged with 30000 *l.* Debts, to his Son the Plaintiff for Life, remainder to his first, &c. Son in tail Male.

This is a good Performance of the Condition.

The Plaintiff's Father in his Life-time, that he might intitle the Plaintiff, his Son, to this Devise, makes a Settlement of his Estate, with a Power of Revocation.

And the now Defendants the Trustees exhibited a Bill against Sir *Francis*, to compel him to make a Settlement according to Rogers's Will.

In answer to which Bill, the said Sir *Francis* sets forth, that he had made a Settlement of his Estate, and, as he conceived and was advised, pursuant to that Will; but however, in case the Court should not think that Settlement sufficient, and according to the Intent of the Will, he

Vol. post. Cas
159.

he was ready and willing to make such Settlement as the Court should direct; and within some short time afterwards, and before any thing further had been done in this Cause, he dies, having first made his Will, and thereby revoked all former Settlements, and devised all his Estate to the Plaintiff, his Son, in the first place for the Payment of Debts, and then to the Plaintiff for Life, and then to his first, second, third, and so to his tenth Son in tail, &c. which whole Estate was alledged to be 6000 *l. per Ann.* and the Debts not above 30000 *l.*

Hereupon the Plaintiff, now an Infant, exhibits his Bill to discover what Debts the said Trustees the Defendants had paid, and to have an Account, to the end that the Plaintiff might be let into the Benefit of the Devise in *Rogers's Will.*

It was in the first place insisted upon by the Defendants Council, that the Plaintiff had no Title to sue in Equity, for that here was no Trust, but if he was to take any thing by this Will, the Estate was executed to him at Law already by the *Statute of uses*, the Words being, *in Trust for the use and benefit of the Plaintiff*, and therefore he might seek his Remedy at Law.

Which was admitted to be so, by the Plaintiff's Council, and by the Court; but however it was insisted, that the Plaintiff was proper in Equity, for that he was intitled to have an Account of the Estate, and to discover what Debts were paid, in order to be let into the said Estate.

It was argued by the Defendants Council, that the Plaintiff's Father had undoubtedly a Power to have prevented his Son's having any Benefit of this Devise, as in case he had absolutely refused to make any Settlement; and it was insisted that in this Case the Plaintiff's Father had defeated his Son of the benefit intended him by *Rogers's Will*, as effectually as if he had made such absolute Refusal, for that
this

this was in nature of a Condition precedent, and was not a Condition to divest an Estate, but the Plaintiff was to take an Estate by his Father's performing of this Condition; and this Condition was in no sort performed; whereas such Conditions in Equity, if not precisely, yet at least ought to be performed *cy pres*, and especially in this Case, the Plaintiff being no Purchaser, and therefore if the Condition be not so performed, as to intitle him at Law, he ought not to be aided in this Court, unless there had been some Practice in the Defendants to prevent or obstruct the Performance of this Condition, whereby to gain the Estate to themselves; but of this there is not the least Shadow of Proof: And that the Condition is not in this Case performed, is manifest; for as to the Settlement made by Sir *Francis* in his Life-time, *that* was with a Power of Revocation, and was actually revoked by his Will; and as for his Will, they did admit, that he might, as this Case is, have made a sufficient Settlement by his Will, and as available, as if the same had been by Act executed in his Life-time; But they insisted, that by his Will he had not made any such Settlement, as was required; neither as to the Quantity nor Quality of the Estate devised. For in the *First* Place, the Estate was incumber'd with very great Debts, and so could in no sort be reckoned a quiet or compleat Settlement. *Secondly*, One Third of the Estate devised would not satisfy the Debts. And *Thirdly*, By *Rogers's* Will Sir *Francis* was to settle two Thirds of his Estate upon the Plaintiff and his Heirs Males, which was a Fee Simple, or at least an Estate Tail, being in Case of a Will; But here he had devised to his Son an Estate for Life only: And for an Authority that Equity shall not relieve against the non-Performance of such a Condition, they cited *Fry* and *Porter's* Case.

But it was answered by the Plaintiff's Council, that Mr. *Rogers's* Intent in this Will appeared to be only to preserve as great an Estate in the Family, as he could, and made this Devise with such a Condition, with an Intent
Y only

only thereby to oblige the Plaintiff's Father to leave him the greater Estate; and the Intent of the Devisor ought to be chiefly regarded in his Will; and this Condition, which the Testator intended for the Benefit and Advantage of the Plaintiff in Equity, ought not to be turned upon him to his Prejudice: And the Intent Mr. *Rogers* had of preserving an Estate in the Family, was better answered by the Devise in Sir *Francis's* Will, whereby the Plaintiff is made barely Tenant for Life, than if he had been Tenant in Tail or in Fee: And they insisted, that by the Will the Defendants the Trustees were to request Sir *Francis Popham* to make the Settlement, which for ought appeared they had not done, and so they had failed in performing of the first Act, and ought not to take Benefit of their own Laches. (*Mes semble moy*, that the exhibiting such Bill against Sir *Francis* as aforesaid was a Sufficient Request) And that they were mistaken, who called this a Condition precedent, for that in truth it was a Condition subsequent, for the Estate vested by the Will upon *Rogers's* death, and Sir *Francis* had all his Life-time after to perform the Condition: And a difference was taken, where the Condition was to be performed by the Party himself, who was to have Benefit thereby, and where by a third Person.

Lord Chancellor. This Devise by Mr. *Rogers* to Sir *Francis Popham's* Family was an Act of great Honour and Gratitude, and yet but a just Retribution; for it appears by the Acts of this Court, that Mr. *Rogers* had this Estate out of that Family: And altho' this Settlement be allowed to be good, yet still the Trustees may have a Benefit by this Devise, that is, in case the Plaintiff, who is now an Infant of tender Years, die without Issue.

First, I take it clearly, that this is no Trust, but an Estate vested at Law, and well executed by the Statute of Uses; for the Trust here arises out of the Estate, and
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in such case the Devisee might by the Statute of 1 Rich. 3. have made Leases.

Secondly, It is as clear, that this is a Condition subsequent, and not a Condition precedent, and that will make a very great difference in this Case; For precedent Conditions must be literally performed; and this Court will never vest an Estate, where by Reason of a Condition precedent, it will not vest in Law. And so it was ruled here in my Lord *Feverham's* Case, tho' the Lords afterwards reversed that Decree. But of Conditions subsequent, which are to divest an Estate, there it is otherwise: Yet of subsequent Conditions, there is this difference to be observed, (for against all Conditions subsequent, this Court cannot, nor ought to relieve) When the Court can in any case compensate the Party in Damages for the non-precise Performance of the Condition, there it is just and equitable to relieve, as if a Man's Estate be upon Condition to pay Money at a certain Day, and he fails of Payment; But where the Party cannot be compensated in Damages, it would be against Conscience to relieve; And that was the Reason of the Judgment in *Fry* and *Porter's* Case; where the Daughter having married without such Consent as by the Condition was required, the non-Performance of that Condition could not be compensated in Damages.

No Relief in Equity, in case of a Condition precedent, if not performed.

Equity relieves against breaches of a Condition, where Court can make a Compensation.

As to what has been objected, that the Plaintiff in this Case is by his Father's Will made Tenant for Life only, whereas by the Condition he was to have had a greater Estate; he conceived, that was well enough, and better answered Mr. *Rogers's* Intent, than if the Condition had been literally performed; and declared, that if the Substance of the Condition in this Case was performed, it should serve turn. But as to the Quantity of the Estate left the Plaintiff by his Father's Will, if that should prove deficient in Value, it might make a new Case, and therefore ordered a Master to examine the Value of the Estate

Sufficient if the Intent of a Condition be performed, tho' not the Words.

estate devised, and the Amount of the Debts, which that Estate was charged with, and to report to the Court, whether after Debts paid there would be Two full thirds of Sir *Francis Popham's* Estate, which was settled upon him in Marriage, left to the Plaintiff; And also in the mean time to proceed to take the Defendants Accounts.

Cafe 74.

14 Novembris.

In Court

Lord Chancellor.

Vid. ante Cafe

58. post Cafe

139.

Bovey versus Smith.

Lit. S. 395.

1 Inst. 242. a.

Fine levied by a Trustee, and 5 Years past, does not destroy the Trust nor separate it from the Land, but transfers them both together.

THIS Day this Cause came again to be reheard; and the Matter insisted on by the Defendant's Council was not, that the Judgment was erroneously given at the former Hearing, but they endeavoured to vary the Cafe, Lord *Chancellor* declaring he did not see what they could object against the Decree at the former hearing, and that he was the more established in his Opinion, having, since that Decree pronounced, discoursed with the Lord Chief Justice *North*, who concurred with him in Opinion. He told them it was *Littleton's* Cafe, where a disseisor for repurchases the Estate; in that Cafe the Disseisor may re-enter. And so where a Man wrongfully possesses himself of my Goods and sells them in a Market Overt, if he afterwards buys these Goods again, I may seize them in his Custody. That in this Cafe the Fine had not destroyed the Trust; for a Fine being but a Conveyance did not extinguish or separate the Trust from the Land, but transferred them both together.

But the Council for the Defendant would have it that the Intent of the Devisor was to pass a Fee to the Daughters, but the Will being in *Dutch*, they had not there the Word (*Heir*) in use amongst them; but a Devise to Children and their Children according to their Customs passed a Fee: In this Cafe the Testatrix had devised the Writings belonging to the Estate, and in all other Parts of the Will where she had devised the Writings, she had passed

fed a Fee, and insisted on the Words in the Will (*Houses purchased with my Capital*) as, that these Words imported a Fee; and it was further insisted, that in this Case, the Plaintiff as Reversioner came too soon, some of the Daughters Children being living, and to prove that, they had the living exhibits here in Court.

But it was answered, that the Words (*Purchased with my Capital*) signified nothing as to the Greatness of the Estate devised, but she being a Feme Covert, and Trading as a Feme Sole, those Words were only to express, that she had purchased those Houses with the Money she had got by her separate Trade; And as to what was objected, that in *Dutch* they never use the Word *Heir*, that signifies nothing, for a Will that concerns Land in *England* must be so framed as by the Law of this Realm is required for the passing of Estates, as has been several times resolved in Cases of *Latin Wills*, and the like: And the Defendant's Council had answered their own Objection, by another Objection they made, that in other parts of the Will where she had devised the Writings, she had devised a Fee, whereby it appeared she was not ignorant how to have devised a Fee (as they would have it she was) if such had been her Intent; and as to the Objection of the Grandchildren being living, it was said that the Will as to them was idle and void, it being *to such of her Daughters as should be living at her Decease, and to the Children of the Survivor of them.*

Wills in *Latin* or *Dutch* must be so fram'd as to pass an Estate according to the Rule of our Law.

Then an Objection was started by the Court, *viz.* that the Testatrix having by Deed in her Life-time settled the Premises to such Uses as she should appoint, and in default thereof, to her five Daughters and their Heirs, therefore if a Fee does not pass to them by the Will, but only an Estate for Life, yet the Reversion passed by that Deed; for where a Man has a Power of appointing a Fee; he may execute it at several times, and appoint an Estate for Life at one time, and the Fee at another time.

A Power of appointing a Fee may be executed at several times, *viz.* at one time to pass an Estate for Life, and the Fee at another.

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In Answer whereunto it was said, that she having by her Will appointed an Estate for Life only to four of the five Daughters that were to take the Fee for default of Appointment, that shewed her Intent, that they should not take a Fee, and was an implicit Appointment of the Fee to the Plaintiff her Heir. And it was agreed, that this Objection was of Weight, and therefore the Council prayed a Day to be heard to it, which was ordered accordingly.

Cafe 75.

Gray & Ux' versus Bull.

17 Novembris.

In Court
Lord Chancellor.

Bill to be relieved against a Release, as gained by Fraud; it appeared there had been another Release given; and tho' it was said, that was got in the same manner, yet not being taken notice of in the Bill, nor Relief prayed against it, Bill was dismissed.

THE Bill in this Cafe was to be relieved against a Release, setting forth that *Bull* the late Husband of the Defendant, being possessed of a great personal Estate, to the Value of 6000*l.* and upwards, devised the same to be equally divided between the Defendant (his Widow) and his Daughter, now the Plaintiff's Wife; but that the Defendant concealing the Value of this Estate, got from her Daughter a Release of all her Interest in the said Estate for 350*l.* alledging that her Part of the Estate came to no more; and therefore to have an Account, and be relieved against this Release, was the Bill.

But it appearing, that the Plaintiff *Gray* was only a second Husband to *Bull's* Daughter, and that her former Husband had released, it was objected that the Plaintiff in this Cafe could not be relieved; altho' it was insisted for the Plaintiff, that the second Release was grounded on the same bottom with the former, and was for the same Reason fraudulent, the Value of the Estate having been in both Cafes concealed; and that the Release given by the Plaintiff's Wife's former Husband was upon little or no Consideration: To which it was answered, that the second Release was upon very good Consideration, for it was upon Receipt of the remaining part of the said 350*l.* and a Release given on the completing Payment is as Valid, and
upon

upon as good Consideration, as a Release given upon immediate Receipt of the whole: But in this Case, if the second Release was fraudulent or avoidable, yet it cannot be avoided by the Plaintiffs, for they have no Bill to be relieved against this second Release, the Plaintiff's Bill taking notice of nothing but the first Release; and thereupon the Bill was dismissed.

Izraell versus Narbourn.

Case 76.

17 Novembris,

*At the Rolls.
Master of the
Rolls.*

THE Bill was to be relieved against a Bail-Bond, setting forth, that the Defendant the Sheriff by a fraudulent Practice had been prevailed upon to return a *Cepi Corpus* a Year after the Defendant in the Action at Law was dead; and tho' he was not amerced for not having the Body at the Day, yet had by a Combination with the Plaintiff at Law assigned this Bond; and now a Suit was commenced at Law in the Defendant's Name: All which was fully made out by Proof; yet for as much as the Plaintiff in the Action at Law, to whom and for whose benefit the Bond was Assigned, was not made a Party, *the Master of the Rolls* refused to relieve the Plaintiff in this Case, and the rather for that he having made the Plaintiff at Law a Party to his Bill, had never served him to Answer; (tho' if he had not been named a Party, the Defendant the Sheriff might have demurred) but ordered the Plaintiff at Law to be brought to hearing, and continued the Injunction in the mean time.

Bill to be relieved against a Bail-Bond assigned by the Sheriff by Fraud. Plaintiff in the Action at Law must be made a Party.

Goddard versus Keate.

Case 77.

17 Novembris.

At the Rolls.

THE Effect of the Bill was, that the Plaintiff, Lord of a Manor in the West, had, according to the Custom there, made a Lease to the Defendant's late Husband for 99 Years, if three lives lived so long, and in the Lease there was a Covenant that the Lessee should repair:

At the Rolls.
Lessee, where there is a Covenant by him to repair, makes an Under-lease to J. S. who is in Possession.

Under-Lessee
not liable to
this Covenant
in Law, nor
bound by it in
Equity, unless
the first Lessee
is insolvent.

pair: That the Defendant's late Husband had made a Lease for 10 Years to Trustees in Trust for his Wife the Defendant, if she lived so long: That the Defendant was in Possession, and the Premises being much out of Repair, the Plaintiff had brought an Action at Law against the Defendant on the Covenant; but she shewing that the Estate in Law was in Trustees, the Plaintiff was forced to be nonsuited, and therefore that she receiving the Profits might be compelled in Equity to repair, was the Bill.

For the Plaintiff it was argued, that where a Man makes a Lease rendring Rent, if the Lessee assigns to a Beggar or insolvent Person, in Equity the Lessee shall be bound to pay the Rent, which was a common Case, and in parity of Reason with this Case.

But for the Defendant it was insisted, that this was not any Assignment of the Term, but only a derivative Lease, and there was no Privity between the first Lessor the Plaintiff, and the Defendant, and therefore she ought not to be charged in Equity; but the Plaintiff had a proper Remedy at Law against the Executors of the first Lessee, who were not made Parties, nor brought before the Court. If the first Lessee had not left Assets, then indeed there might be some reason in Equity to charge the Defendant with this Covenant; but where the proper Remedy did not fail, the Plaintiff shall not be suffered to resort to this extraordinary Remedy; and thereupon the Bill was dismissed.

Case 78.

15 Novembris.

In Court

Lord Chancellor.

A Man marries
an Orphan,
who dies under

21.

Her Orphanage
part shall not
survive to the
other Children,
but shall go to
the Husband.

Fouke versus Lewen.

THE Bill was to have an Account of a Citizen's personal Estate, and to be let into the Orphanage part, the Plaintiff having married a Citizen's Daughter. And the chief Point of the Case was, whether the other Children of *Lewen* the Citizen were so advanced by him in his Life-time, as to exclude them of their Orphanage part.

Per

Per Curiam any Provision made by the Father in his Life-time for his Children is an Advancement within the Custom, unless it be declared by writing that they are not sufficiently advanced; and for some time it was held that in such Writing there must be Mention made what Sum they received from their Father, because of bringing it in *Hotch-pott*. *Wid. p^o 2. Cause 213.*

But it was insisted that the Plaintiff's Wife being dead, and she dying before the Age of *Twenty one*, her Husband not having received her Share of the Orphanage part, her Share by the Custom did survive, and prayed that the *Recorder* might certify the Custom in this Particular; and to prove the Custom they cited *Pheasant's* *1 Ch. Rep. 151. 2* Case.

But the Court rejected this matter; for altho' if an Orphan dies before *Twenty one* Years of Age unmarried, there may be such Custom, yet that Custom cannot take Place, where the Orphan is married, and the Interest of her Share vested in her Husband; and if there was any such Custom, it would be unreasonable and void: And *Pheasant's* Case is nothing to the Purpose; For there the Husband dying, and his Wife's Orphanage Share remaining in the Chamber of *London*, the Question was, whether it was *Debitum* or *Depositum*, and whether the Widow should have it, or the Executors of the Husband.

Then they insisted on a Clause in *Lerwin's* Will, recommending his Children (whom the Plaintiff would have to be fully advanced) to the Care of his Wife, to provide further for them; and that that amounted to a sufficient Declaration, that he thought them not fully advanced: But it was answered, that such an Implicit Declaration would not serve turn; and besides that Clause had another Meaning, and did work upon the Legatory Part only.

Q. Whether any Provision made by the Father for his Child be an Advancement, or whether only such a Provision *Whether any Provision made by a Freeman for a Child, unless upon Mar-*

riage, or in purfuance of a Marriage Agreement, be an Advancement.
 vifion as is made on the Marriage of the Child. It
 seems to be only fuch a Provilion as is made on Marriage,
 or in purfuance of a Marriage Agreement.

Cafe 79.

18 Novembris.

In Court

Maſter of the
 Rolls.

Defendant demurred, for that the Plaintiff had made no Title by his Bill, and alfo answered ſeveral parts of the Bill.

Demurrer over-ruled by the
 Anfwer.

Savage verſus Smalebroke.

THE Defendant having demurred, for that the Plaintiff had made no Title to himſelf in the Bill, (as in truth he had not) Mr. *Hutchins* inſiſted, that the Plaintiff had over-ruled his own Demurrer, by having answered over to ſeveral Parts of the Bill. But the Matter of fact being denied, and there being no Books in Court, the Matter was adjourned.

Cafe 80.

20 Novembris.

In Court

Lord Chancellor.

Noel verſus Robinſon.

UPON a Rehearing the Caſe was thus. Sir *Martin Noel*, Father of the Plaintiffs, being poſſeſſed of a great Perſonal Eſtate, and of a Moiety of a Plantation beyond Sea, made his Will, 23 Sept. 1665. and the Defendant *Robinſon* and two others Executors thereof, and deviſed his ſaid Moiety of the Plantation and of the *Negroes* and Stock thereto belonging to the Plaintiffs, *Nathaniel, Grace,* and *Elizabeth*, his Children, then Infants, and directed the Executors to receive the Profits, and to give an Account, and pay the Proceed thereof for the Maintenance and Education of the Plaintiffs.

The Defendant *Robinſon* only proved the Will and took on him the Management of the Teſtator's Moiety of the Plantation, and afterwards made a Leaſe thereof to one *Worſam* for a term of Years, and reſerved the Rent to himſelf in truſt for the Plaintiffs Uſe.

The Plaintiffs brought their Bill againſt *Robinſon* the Executor and one *Faulconer*, who had purchaſed of the Executor the ſaid Moiety of the Plantation for a valuable

ble Consideration, that they might account for the Profits of the Plantation and pay the same to the Plaintiffs, that they might convey to the Plaintiffs the said Moiety of the Plantation, and that they might hold and enjoy the same according to the Will; they insisting, that the Defendant *Robinson* by making the said Lease had assented to the Devise of the Moiety of the Plantation to the Plaintiffs.

The Defendant *Robinson* by Answer admitted the Will, and his making the said Lease and reserving the Rent in manner aforesaid; but said, he made the same in such manner without due Consideration, and not with Intent thereby to assent to the Devise to the Plaintiffs, and thereby deprive the Creditors of their just Debts, and exempt the Estate therefrom; and that the Estate fell short of paying the Testator's Debts, and he had therefore been forced to sell the Testator's Moiety of the Plantation to the Defendant *Faulconer* for 500 l. which he had applied in Payment of the Debts. And the Defendant *Faulconer* insisted on his Purchase.

For the Defendant *Robinson* it was insisted, that he was now before the Court in three Capacities, viz. as an Executor, as a Trustee, and as a Creditor to Sir *Martin Noell's* Estate. And *First*, that this Lease at most was but an Implicit Assent; and it might be taken to be done two ways, either as a Trustee or as Executor; and in this Case it ought to be taken as done *Quatenus* a Trustee; because that way it could work no Wrong to any one. But it was insisted, that in truth there was no Assent, for that depends upon the Intent of the Party, and it appears he did not intend to assent to the Legacy; for when a Lease is specifically devised, if the Executor assent, there is no longer any Interest in the Estate left in the Executor; and it appears, that in this Case the Executor apprehended an Estate still remaining in himself, as appears by his selling this Plantation, and by other his subsequent Acts

Acts concerning the same. And it was likewise insisted, that tho' in Law this Lease might amount to an Assent, yet in Equity it should not; and cited several Cases, in which this Court had mitigated the Rigour of the Law in relation to Executors, and particularly in the Matter of refunding Legacies, viz. the Case of *Biscoe* and *Nelthrope*, and the Case of *Grove* and *Benson*; and that in this Case the Defendant had done no more than what in Equity he might have been compelled to have done, and his doing of it without the Trouble of a Suit ought not to be turned to his Prejudice.

Then it was insisted that in this Case the Defendant the Executor is to be considered as a Creditor to Sir *Martin Noell's* Estate; for being an Executor, and in disburse for Debts by him paid, which were owing by the Testator, he is now become a Creditor for so much to the Testator's Estate; And that a Creditor shall be relieved against a Legatee, that has received his Legacy, was settled in the Case of *Chamberlayn* and *Chamberlayn*. If an Executor assign a Term without Consideration, and Assets fail, the Creditors shall follow this Estate, into whose Hands soever it comes. And in this Case an Executor who had carried himself fairly, and without exception, and it may be, if he had come to any one here to advise with, he could not have been directed how to have managed himself more prudently, it not appearing, nor was it in the least suspected when he made the Lease of the Plantation, but that the Assets would have answered all Debts with a great Overplus, which afterwards became deficient by the breaking of two eminent *Spanish* Merchants, that dealt in *Negroes*, and broke for the Value of 200000*l.* and were then Debtors to Sir *Martin Noell's* Estate to the Value of 30000*l.* and therefore in a Case of such extremity the Executor ought to be relieved against the Rigour of the Law; and they cited the Case of *Holt* the Goldsmith, who being an Executor had given a Recognizance for payment of a Legacy, and afterwards

wards the Assers becoming deficient to pay the Debts by the Fire of *London*, he was relieved against this Recognisance. And where a Fine is ordered to be levied by the Decree of this Court; if it be so done, as to pass a greater Estate, or to operate further in Law than this Court intended, there, tho' a Fine be the most sacred Conveyance at Law, this Court will restrain it to what was the original Intention of levying it.

For the Plaintiffs it was argued by their Council; and *first*, as to the Objection that this Plantation was a Fee simple Estate, but by the Custom of the Country made a Testamentary and Personal Estate in relation to Debts only, but was not a Personal Estate in any other respect, and therefore in this Case the Executor had no Power to assent, as he may, where a Term is specifically devised; it was answered, that an Executor may dispose of a Term or of a Fee simple Estate, that he has in Trust for Payment of Debts, and that this Assent amounted to a Disposition.

As to the Objection, that the Defendant *Robinson* in this Case is a Creditor, *that* we deny; for where an Executor pays a Legacy that he should not have done, that shall not make him a Creditor to his Testator's Estate. And as to the Case of *Hodges* and *Dunkim*, it was not there resolved, that an Executor should be relieved upon the voluntary Payment of a Legacy. As to the Objection, that where a thing may be taken two ways, it shall not be construed to do a Wrong, they may do well to remember another Maxim of the Law, that *a Man's own Deed shall be taken strongest against himself*.

Lord Chancellor. There is a difference between a Suit for a Legacy in this Court, and a Suit for a Legacy in the Spiritual Court. If in the Spiritual Court they would compel an Executor to pay a Legacy without Security to refund, there shall go a Prohibition, as was resolved in the

If the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition shall go.

Cafe of *Knight and Clarke*: But in this Court, tho' there be no Provision made for refunding, yet the common Justice of this Court will compel a Legatee to refund. It is certain that a Creditor shall compel the Legatee to refund, and so shall one Legatee compel the other, where the Affets become deficient: But whether the Executor himself, after he has once voluntarily assented unto a Legacy, shall compel the Legatee to refund, is *Causa primæ Impressionis*: And it must be allowed that there is a great difference between a voluntary Assent, and where the Executor was compelled to assent. We know the common Cafe, if a Man voluntarily pays Mony to a Bankrupt, after he becomes a Bankrupt, it is in his own wrong, and he may be forced to pay it again; but otherwise it is, if the Bankrupt recover it against him by course of Law: And a small matter shall amount unto an Assent to a Legacy; an Assent being but a rightful Act. Whereupon the Lord *Chancellor* confirmed his former Decree, and the Plaintiff's Bill was dismissed.

A Creditor shall compel a Legatee to refund, and so shall one Legatee another, where Affets are deficient.

An Executor, after he has voluntarily assented to a Legacy, shall not compel the Legatee to refund.

A Debt voluntarily paid to a Bankrupt shall be paid over again. Otherwise, if recovered by course of Law.

A small matter will amount to an Assent to a Legacy.

Note, This Cause was three times heard before the Lord *Chancellor Nottingham*, and a Decree pronounced by him for the Plaintiff, and twice confirmed. And on 25 *Junij*, 3 *Jac.* 2. this Cause was reheard by the Lord *Chancellor Jefferies*, who reversed the Lord *Keeper North's* Decree, and affirmed the Decree made by the Lord *Chancellor Nottingham*.

In the arguing of this Cafe, was cited the Cafe of *Davie and Drew* alias *Drewry*, in which it was resolved in the *King's Bench*, and afterwards in this Court, that where an Executor makes a Lease rendring Rent, his Administrator shall have the Rent, and not the Administrator *de bonis non*.

An Executor makes a Lease rendring Rent, his Administrator shall have the Rent, and not the Administrator de bonis non.

Wag Staffe

Wagstaffe versus Bedford.

THE Bill being to have a Discovery and Account of Money received by the Defendant, on the behalf of one who became a Bankrupt, the Defendant Pleaded he received it only as a Menial Servant to the Bankrupt, and had accompted for it to him already, and that the Commissioners had already Examined him on Interrogatories. The Plea over-ruled.

Cafe 81.
20 Novembris.
In Court
Lord Chancellor.
Bill for an Account of Money received for one who became a Bankrupt.
Defendant Pleaded he received the Money as a Menial Servant to the Bankrupt and had accounted for it to him.
Plea over-ruled.
Vid. post Cafe
127 & 204.

Bowyer versus Covert.

THE Defendant had Demurred for want of proper Parties, one of the Executors not being made a Party; and the Demurrer was over-ruled, because the Plaintiff had alledged in his Bill, that he knew not who was the other Executor, and pray'd that the Defendant might discover, who he was, and where he lived.

Cafe 82.
20 Novembris.
In Court
Lord Chancellor.
No good Cause of Demurrer that an Executor is not a Party, when Plaintiff alledges in his Bill, he knows not who is Executor, and prays Defendant may discover him.

Husbands versus Husbands.

THE Cafe appeared to be thus. A Man intending to build a Seat upon his Estate, and having laid the Foundation of it, made his Will (which in time was a little after the making of the Act of *Frauds* and *Perjuries*) and by his Will Deviled Land for raising Portions for his younger Children, and paying of his Debts; and appointed that 400*l.* should be laid out in Perfecting the building of his House.

Cafe 83.
21 Novembris.
In Court
Lord Chancellor.
2 Ch. Rep. 127.
Devise of 400*l.* to be laid out in finishing an House.
Testator lives to lay out as much himself, but leaves the House unfinished.
The 400*l.* shall not be laid out.

It happened, that he lived several Years after the making of this Will, and in that time expended upon his House above 400*l.* altho' he left the same unfinished, and died, leaving such Will as afore said: but the same was defective,

as to the passing of the Lands intended to be passed thereby, for not being Subscribed by Witnesfes according to the said Act of Parliament.

Whether personal Estate shall be lessened in prejudice of younger Children to make good a Direction in the Father's Will for the Benefit of the Eldest Son, when he at the same time takes advantage of a defective Execution of the Will, and defeats the Father's Intention in favour of his younger Children.

It was now insisted by the Council for the younger Children, that the Heir at Law ought to have no benefit of the 400*l.* by the Will appointed to be laid out on this House. *First*, Because the Testator himself, after the making of this Will, had expended above that Sum on the House; and instanced in some Cases of the like nature, where it had been so Decreed. *Secondly*, The Testator's Intent appearing and plainly Expressed in his Will, was, to have Charged his Land with several Sums of Mony; but that Intent being frustrated by the Act of *Frauds* and *Perjuries*, the Heir had a greater Benefit thereby, than if the Devise had stood good, and the 400*l.* was to be laid out on the House, for his Estate is now eased of 1000*l.* that would have lain upon it, if the Will had been good in form; and therefore it would now be very hard for a Court of Equity to charge the Testator's Personal Estate with this 400*l.* whereby the Provision intended the younger Children (which was already, by their Father's not observing of the Act of *Frauds* in making of his Will, very much abridged) wou'd in a manner be wholly defeated.

As to the *First* Objection, it was Answered, that the Testator had a little before his Death, and after he had expended such Mony as they on the other side mention to be 400*l.* declared his Intent to be, that whether he lived or died, that Work should be perfected; and his usual Saying was, that his House should never be called *Mockbeggars* Hall.

As to the *Second* Objection, they conceived the 400*l.* ought not to be taken away upon that Pretence, unless the same had been expressly charged upon the Land, which in this Case it was not.

But the Lord *Chancellor* Decreed against the Heir at Law, who was Plaintiff here in Equity to have the benefit of this 400*l.* upon the *First* Objection; And so there was no Opinion Declared as to the Second Point, tho' the Court seemed to incline against the Plaintiff in that also.

Perkins & al' versus Walker & al'.

Case 84.

ONE *John Walker* having by a Voluntary Settlement made himself Tenant for Life, with a Power to lease or grant for a Thousand Years at any Rent, he by Deed grants the whole Term to Trustees, in Trust that he himself should enjoy the same during his Life, and afterwards in Trust, by Sale or otherwise to raise out of the Premises several Sums of Money for Payment of his Debts, and to discharge a Mortgage of 200*l.* and other Sums, which he appointed to the Plaintiffs, his Nephews and Neices; which Deed was with a Power of Revocation.

21 Novembris.

In Court
Lord Chancellor.

A Mortgage after a Voluntary Settlement with Power of Revocation, and a Will in Confirmation of it, is a Revocation *pro tanto* only.

After this, the said *John Walker* having Occasion for Money, he Mortgages this Estate three several times to Sir *William Humble*, having before that made his Will and Confirmed his said first Deed, and thereby appointed other Legacies to be paid by his Trustees.

The Point insisted on was, that by these Subsequent Mortgages to *Humble*, the said *Walker* had revoked his Will, and the former Deed, that was made with a Power of Revocation. *Sed non allocatur*; It might be a Revocation *pro tanto*, but no otherwise.

And the Lord *Chancellor* cited the Case of *Coke* and *Bullock*, 2 *Crook* 49. That a Man having by Will devised a Fee Simple, afterwards by Indenture makes a Lease for Years of the same Lands; this Lease, if not made to the same Person, shall be a Revocation *pro tanto* only, even at Law: and the Principal Case is much stronger in Equity, which will charge and subject an Equity of Redemption.

A Man devises Land in Fee, and then makes a Lease for Years of the same Land. The Lease, if not made to the Devisee, is a Revocation at Law *pro tanto* only.

Ber- Vid. post Case

133.

Case 85.

21 Novembris.

*Berrisford versus Done.**In Court
Lord Chancellor.*

An Officer in the Army agrees to surrender his Commission to I. S. in consideration of 100*l.* for which Bond is given.

The Officer surrenders, but I. S. is refused the Commission.

No Relief against this Bond.

DONE (the Defendant's Son) being a Captain of a Company in *Ireland*, and growing sickly, and not likely to live long; and the Plaintiff being Lieutenant of the same Company, treated with him to surrender his Command, that so he might be advanced in his Place; and at last they agreed that in Consideration of 100*l.* he should surrender it, and a Bond was given for the 100*l.*

The Bill was against the Executrix of the Obligee, to be relieved against this Bond: And upon the Plaintiff's Proofs in the Cause, the Case appeared to be thus, *viz.* That *Done* did surrender, but that the *Duke of Ormond* did refuse to accept of the Surrender, and would not admit the Plaintiff thereon, alledging that *Done* had freely received the Place from the Duke, and therefore now *Done* was grown weary of it, and had kept it as long as he thought fit, the Duke would not suffer him to sell it: And the *Duke of Ormond* and his Secretary being examined for the Plaintiff in this Cause deposed to that Effect.

The Plaintiff's Council insisted on the Disadvantages that would attend the countenancing of such Bargains, and the Discouragement it would be to Gentlemen, that they should not by their continued Service raise themselves to Preferment; but must either buy the same, or suffer others to jump over their heads, let them have never so well merited Preferment.

But for the Defendant it was insisted, that the Agreement was not to sell an Office, but only to do a lawful Act, which was to surrender the Commission; and this was literally performed; and the said *Done* did not under-

undertake the Plaintiff should be admitted upon such Surrender; but the Plaintiff was to look to that himself; and if he has not profited by this Surrender, it was his own Fault: And in truth he, finding *Done* a dying Man, forbore to get himself admitted in *Done's* Life-time, that he might have this pretence to avoid his Bond; and *that* now is the Thing that grieves the Plaintiff, and occasions this vexatious Suit. That the Plaintiff was over-hasty to purchase the Commission, which, if he had had a little more Patience, he might have obtained at an easier Rate; But his own improvident Bargain can create no Equity to himself. And Mr. *Hutchins* cited a Case in point, that had been decreed but the last Term; Where a Man contracted with an Officer to surrender his Place for 100 *l.* and gave Bond for it; and afterwards the Officer surrenders accordingly; But the Obligor being not judged fit for the Employ by his Superiors, could not procure himself to be admitted, and thereupon came into *Chancery* to be relieved against his Bond entred into for Payment of this 100 *l.* but was dismissed.

A. agrees to surrender his Office to B. for 100 *l.* for which B. gives Bond. A. surrenders, but B. not being qualified is refused to be admitted. No relief for B.

In the Principal Case the Lord *Chancellor* decreed for the Defendant; but ordered her to accept of her Principal Mony, without either Interest or Costs.

Turner versus Gwynn.

Case 86.

21 Novembris.
In Court
Lord Chancellor.

THE Case was to this effect. A Man having a long Term for Years settled to attend the Inheritance, which was entailed, he, by a Fine and Deed to lead the Uses thereon, subjected this Term for the Payment of 1000 *l.* but declared, that after that Sum was paid the Land should be to the same Uses as before.

One seized in Tail, and a Term in Trustees to attend the Inheritance, levies a Fine, and by Deed subjects the Land to a Debt of 1000 *l.* but declares, that, after the Debt paid, the Land to be to the old uses, and after devises the Land for payment of all his Debts.

The Bill was to subject this Term to the Payment of other Debts.

For

Decreed the
Land liable to
all the Debts
in General.
Sed Q.

For the Defendant it was insisted, that a Term, which is limited to attend the Inheritance, is not Affetts, either in Law or Equity; and when it is subjected for a particular Purpose only, it shall not be strained nor extended further.

But for the Plaintiff it was answered, that tho' a Term limited to attend the Inheritance was not in it self in any sort Affetts either in Law or Equity; yet a Man, that has such a Term in him, may subject it to the Payment of Debts, if he pleases; and *Gwynn* in this Case has actually done it, he having by his Will devised all his Lands in the County of *B.* where these Lands lie, for the Payment of his Debts.

To this it was answered, that those Words in the Will might be otherwise satisfied, for that he had Fee Simple Lands in that County, and the Devise should be intended of them only; but that not appearing in the Cause, it was decreed for the Plaintiff, and the Land subjected to the Payment of the Testator's Debts in General. *Sed tamen Quere.* For it seems, he was but Tenant in Tail of the Inheritance, and so could not charge it by his Will, unless it be intended he had still a Power of doing it lodged in him by reason of the Fine, notwithstanding he had declared, that after Payment of the 1000*l.* it should go to the former Uses.

Case 87.

22 Novembris.
In Court
Lord Chancellor.

Voluntary Settlement without power of Revocation shall bind the Party, and shall not be defeated by a subsequent Will.

Villers versus Beaumont & al.

THE Case upon the Pleadings appeared to be thus, viz. The Lady *Anne Beaumont* took a Lease from an Hospital in *Leicester* for three Lives in Trustees Names, in Trust for her and her Heirs. She dies, and this Lease comes to one *William Beaumont*, who a little before his Death, by a little scrap of Paper at an Ale-house, but under Hand and Seal, settles this Term (in which he had then only a Trust) upon the Plaintiffs his Cousins, to the Intent to pay his Debts, and gave the Surplus to them.

After

After this, he being dissatisfied with this Settlement, which he had delivered out of his Hands to a Creditor, makes his Will in Writing, and thereby devises this Term, subject also to the Payment of his Debts, to his half Brother the Defendant the Lord *Beaumont*, in whose Family this Lease had for a long time been: And the Question was, whether the Deed or Will should prevail.

On behalf of the Defendant it was insisted, that the manner of obtaining this Deed carried with it Badges of Fraud and Circumvention, or of a Surprize at least; Mr. *Beaumont* declaring as much, presently after the executing of it: And it was further insisted, that a Man had a Power over such a voluntary Settlement, for which was cited the Lord *Ormond's* Case, as an Authority in Point.

But it was answered, that all latter Resolutions had been contrary to the Opinion in that Case, and instanced particularly in the Case of *Crump* and *Bowater*, and the latter Case of *Curtis* and *Hatcher*, concerning Mrs. *Levisson's* Estate; where it was resolved, that a second Deed should not prevail against the former; much less a Will.

Lord *Chancellor*. There is no colour in this Case: If a Man will improvidently Bind himself up by a voluntary Deed, and not reserve a Liberty to himself by a Power of Revocation, this Court will not loose the Fetters he hath put upon himself, but he must lie down under his own Folly: For if you would relieve in such a Case, you must consequently establish this Proposition, *viz. That a Man can make no voluntary disposition of his Estate, but by his Will only, which would be absurd.*

Child versus Stephens.

Case 88.

23 Novembris.

In Court
Lord *Chancellor*.

A Man indebted
by several
Mortgages,
Judgments,
Bonds, and sim-

THIS Case came before the Lord *Chancellor*, upon a Point reported specially by the *Master* for his Lordship's Judgment, and was in short no more than this.

D d

Upon

ple Contract, settles his Estate for Payment of his Debts.

The real Securities shall be first paid, and then the Bonds and simple Contract Debts in an Average.

Upon Mr. *Child's* Estate there were many Mortgages, Judgments and Statutes, and he likewise owed several Debts upon Bond and simple Contract, and had both by Deed in his Life-time and by Will conveyed and settled all his Lands upon Trustees for Payment of his Debts: Now some Parts of his Estate he had mortgaged no less than thrice over; each time for near the full Value.

It was now insisted, that these subsequent Mortgages were not Incumbrances on the Land; for all the Estate in Law was in the first Mortgagee, and so the subsequent Mortgagees had only an Equity; and likewise the Judgments, they would not immediately affect the Land then in Mortgage: And it comes within the common Case, where a Man settles by Deed, or devises by Will, Lands for Payment of his Debts; there all Creditors shall be paid alike in proportion; whether they are Creditors by Bonds or on simple Contract, unless their Security do affect the very Land so settled or devised for Payment of Debts; and therefore the subsequent Judgments and Mortgages ought only to be paid in proportion with the Bond Creditors and Debts upon simple Contract, which the Lord *Chancellor* at first conceived ought to be so done; and asked what could be said against it.

Whereupon it was insisted, that the Mortgagees had a Security for their Money, which a Court of Equity would never take from them, and being so, there could be no Sale made of this Estate without their Consent; and so all the Debts would remain unsatisfied: For they that had the subsequent Securities, had still, in Preservation of their own Interest, a Right to redeem: And to set this Estate in a course of Redemption, would make pretty Work in this Case, where there were more than thirty Mortgages. For Example, *A* is a subsequent Mortgage; *B* has a prior Mortgage of a Moiety of the Lands contained in *A's* Mortgage, and also of several other Lands. *C* has a prior Mortgage of the other Moiety of the Lands comprised in *A's*

A's Mortgage, and also of several other Lands: Now has *A* a plain Right to redeem all the Lands contained in both the Mortgages of *B* and *C*; and so it may be carried on through the Alphabet.

And after long Debate, the Lord *Chancellor* ordered, that the Real Securities should be first satisfied, and then the Debts by Bond and simple Contract to be paid in Average; for that any other Method in this Case would become impracticable.

Afterwards at another Day, viz. 5th of *December*, being the first Seal, a Motion was made in this Case on behalf of one *Penruddocke*, (who had a Judgment on this Estate) that he might be let into a Satisfaction of his Judgment, before the second Mortgagees, he being at Law intitled to that Preference, and therefore ought not to be deprived of it in Equity.

The Lord *Chancellor* declared, he thought the Motion reasonable; till upon repeating the Reasons above mentioned he was satisfied, it was not to be done in this Case: If legal Preference should be precisely observed, it would end in Confusion; and so made no Order upon the Motion; all the other Creditors having consented to the former Order; but left *Penruddocke* to get his Satisfaction, as he could by Law.

Anonimus.

Case 89.

23 Novembris.

UPON a Motion, an Order for a Man to make his Election, whether he would proceed here, or at Law, was discharged, as being irregular; for that it was obtained before the Defendant had answered.

In Court.
Lord Chancellor.
Plaintiff is not bound to make his Election, till Defendant has answered.

Anonimus.

Case 90.

13 Novembris.

*In Court**Lord Chancellor.*

Where Land is devised to pay Debts and Legacies out of the Rents and Profits, the Land may be sold. Otherwise, if out of Annual Rents and Profits. But if such Trust is by Deed, the Land can't be sold in either Case.

Anonimus.

WHERE a Man devises Lands for Payment of Debts and Legacies out of the Rents and Profits of the same; there the Trustees, it being in the Case of a Will, may sell the Lands: But if it be to pay Debts and Legacies out of the annual Rents and Profits; there, tho' it is in Case of a Will, the Lands shall not be sold: But such Words in a Deed executed in a Man's Life-time shall, in neither Case, impower the Trustees to sell.

Case 91.

Anonimus.

IF the Defendant is in Contempt for not answering, and on Motion he obtains time to answer; if it be not expressly ordered, that all Contempts in the mean time shall be staid, the Plaintiff may go on and prosecute the Defendant for not answering.

Case 92.

Dowse versus Derivall.

27 Novembris.

*In Court**Lord Chancellor.*

A Freeman of London, having a Term in his own Name, purchases the Inheritance in the name of a Trustee, and there is no Declaration of Trust, that the Term shall attend the Inheritance.

This Term shall attend the Inheritance, and not be subject to the Custom.

Visd. ante Tiffin and Tiffin, Case 1.

A Citizen and Freeman of London, possessed of a Lease worth 1500*l.* bought the Reversion and Inheritance thereof in the name of Trustees for 150*l.* and died. And whether this Lease being Assets in Law shall be part of his Personal Estate, subject to the Custom of London (there being no Declaration that it should attend the Inheritance) was the Question.

And it was decreed, that tho' this Lease would be Assets in Law to pay Debts; yet it should attend the Inheritance, tho' there was no Declaration of Trust that it should do so, and not be liable to the Custom.

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This

This Cause was reheard before the Lord Keeper North in Feb. 1683. and he confirmed the Decree.

2 Ch. Rep.
Rich versus
Rich. Fol. 160.

Anonimus.

Cafe 93.

WHERE a Man is put to his Election, whether to proceed at Law or in this Court, if the Bill be for the Land and to have an Account of the mesne Profits, he may Elect to proceed in an Ejectment at Law for the Possession, and in Equity upon the Account; because at Law he can recover Damages for mesne Profits, from the time only of the Entry laid in the Declaration.

Special Election
to proceed at
Law in an E-
jectment for
the Land, and
in Equity for
an Account of
Profits.

Sackvill versus Ayleworth.

Cafe 94.
15 Decembris.

ONE *Ayleworth* having formerly made a Will, and thereby devised great Part of his Estate to the Plaintiff *Sackvill*, and *Ayleworth* the Testator being since that time become a Lunatick, the Plaintiff exhibited his Bill against the Defendant (who was Presumptive Heir at Law to the Lunatick) to examine Witnesses touching this Will *in Perpetuam rei memoriam*: And the Defendant Demurred, because it was a Bill to prove a Man's Will in his Life-time; and for that the Plaintiff had no Right or Title by the Will until the Testator's Death: a Will being until that time ambulatory, and in truth is no Will till the Testator's Death.

At the Lord
Chancellor's
House: Coram
Justice Charle-
ton.
A Bill will not
lie to perpetu-
ate the Testi-
mony of Wit-
nesses to a
Lunatick's Will,
in his Life-
time, made be-
fore his Lunacy.

For the Plaintiff it was insisted, that to examine Witnesses *in Perpetuam rei memoriam* is a chief part of the Original Jurisdiction of this Court, it being in all Cases a natural Equity to have Testimony preserved; and that in this Case it would be no Prejudice to any one; for if the Lunatick should recover his Understanding, the Will, notwithstanding this Examination, would be revocable: and it might be a manifest Prejudice to the Plaintiff to deny him

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the Benefit of this Examination; for this Lunatick may still live many Years, and continuing a Lunatick he is uncapable of making another Will, or of new Publishing this; and in that time all the Witnesses to the Will, that could prove the Testator to be then *compos mentis*, might be dead. And they compared it to the Case formerly at common Law, where a Man became professed, there his Will should be proved, and yet he was not Absolutely dead in Law; for he might be afterwards *Deraigned*. (but *Q* whether the Will could be proved till after the Year and day, after which time he could not be *Deraigned*.) But Mr. Justice Charleton doubted, whether a Lunatick could have any Will, but that his Lunacy was a Revocation of all Wills made by him, whilst *compos mentis*. (*Mes sauns doubt Lunacie n'est ascun Revocation*) And an Exception was taken to the Bill, that the Lunatick ought to have been made a Party, and to have had a Committee assigned him, to have defended the Suit: but it was answered, It is true, where a Lunatick is sued, he must have a Committee assigned him to defend the Suit; But in this Case there was nothing Pray'd against the Lunatick, and so no need of that. But the Bill was dismissed.

Case 95.

Wright versus Blicke.

15 Decembris.

At the Lord
Chancellor's
House: Coram
Justice Charle-
ton.

Bill by an Ad-
ministrator for
discovery of the
Personal E-
state.

It is no bar
to the disco-
very, that the
Administration
is litigated.

A Man by Will devised several Legacies, and made the Defendant sole Executor; who having the Right of Administration, to avoid the Legacies, refuses to prove the Will, and had indeed sworn that the pretended Intestate had made no Will, (for otherwise the Spiritual Court would not have granted Administration) and thereupon obtains Administration, and exhibits a Bill to have a Discovery of the Personal Estate.

To this Bill the Defendant pleaded, that the supposed Intestate had made a Will, and produced it in Court, and that the Plaintiff was privy to the making of it, and that there

there was now a Suit depending in the Spiritual Court, to revoke the Administration, and the Plaintiff was cited to prove the Will.

But the Plea was over-ruled, as containing no Equity, why the Defendant should not answer as to the Discovery of the Testator's Estate.

Page versus Neale.

Cafe 96.

THE Bill being to be relieved against a Bond of the Testator's, suggesting that it was entred into without any Consideration, it being only for that the Testator had unlawfully kept Company with the Defendant, and had a Bastard by her :

Eodem die.
Coram Justice
Charleton.
Demurrer to
scandalous
Matter suggested in a Bill.

To that part of the Bill the Defendant demurred, as being a matter scandalous, and that it ought not to be answered unto.

It was insisted for the Plaintiff, that a Demurrer was not the proper way to be relieved for Scandal, but that it was proper to refer the Bill for Scandal, and to have it expunged : But it was answered, that the Defendant might proceed either the one way or the other; and this being a way proper enough by the Course of the Court, if this Demurrer should not be allowed, every Woman might be brought to swear, whether such a Man did not lye with her.

But on the other hand it was insisted, that if this Demurrer should be allowed, then tho' the Matter which they call scandalous were true; (and was in truth the only Consideration of the Bond) yet then they could not be received to prove it.

But Sir *Jo. Churchill*, who was not Council in the Cause, informed the *Judge*, that the Course of the Court in such

a Case was, not to put the Defendant to answer the scandalous Matter, but to strike out the Word *Demurrer*, and leave the Plaintiff at Liberty to prove it: Tho' it was doubted, if the Plaintiff proved the Suggestion of his Bill in the principal Case, it would not at all have availed him.

Case 97.

Riddle versus Emerson.

Eodem die.

A Lease for Years to *A*, but by Parol agreed to be in Trust for *A* and *B* jointly. *B* pays a Moiety of the Rent. If this is within the Statute of Frauds, &c.

THE Bill was, that the Plaintiff and Defendant agreeing together to take a Lease of a Colliery of Sir *Gilbert Gerrard*, they contracted with Sir *Gilbert* for it at a certain Rent; but by Agreement, the Lease was taken in the Plaintiff's Name only, but the same was in Trust, that the Defendant should be Joint-tenant with him, and have a Moiety of the Profits, and should pay a Moiety of the Rent: And Sir *Gilbert Gerrard*, both at the sealing of the Lease, and before, had refused to let it to the Defendant, but upon Condition, that the Plaintiff should be permitted to receive a Moiety of the Profits, and be answerable for a Moiety of the Rent: And Sir *Gilbert* had, since the making of the Lease, demanded and received a Moiety of the Rent of the Plaintiff.

To this Bill the Defendant pleaded the Act of *Frauds* and *Perjuries*, and that this pretended Trust was not declared in Writing according to the Act.

For the Plaintiff it was insisted, that this was a resulting Trust, and such a Trust as the Law would create; and therefore there needs no Declaration of it in Writing; for the Rent in this Case reserved is the Consideration of the Lease, and a Moiety of that being according to the said Agreement paid by the Plaintiff, that raises a Trust to him for a Moiety of the Profits: And this is a plain resulting Trust, for a Lessee rendring Rent is in nature of a Purchaser, and shall have the same favour in Equity, as was resolved in the Case of *Woodroffe* and *Cooke*.

Then

Then it was insisted that this was only a Lease for three Years, on which more than two full Thirds of the best improved Rent was reserved, and was therefore excepted out of the Statute.

But it was answered, that there is no Colour to make this a resulting Trust: Indeed where *I. S.* buys Lands, and pays the Purchase Money; if the Conveyances are made to *I. D.* this will be a resulting Trust: But in the present Case, to make a Man a joint Lessee with one, that is sole Lessee by the Lease in Writing, because the Landlord has since accepted a Moiety of the Rent of the other, is ridiculous; neither from this matter, *ex post facto*, can a resulting Trust be raised by construction for the Plaintiff; and that by an Act, *viz.* the Payment of the Rent, to which the Defendant was neither consenting nor privy.

And as to the other Matter, that this is a Lease for three Years only, on which two full thirds of the improved Rent is reserved, and so out of the Act; the Answer is plain; such a Lease may be made by Parol, but when such a Lease is made in Writing, the Trust of that Lease cannot be declared by Parol. But the Judge being doubtful, tho' inclined to over-rule the Plea, the Council consented, that the word Plea should be struck out, and that it should stand for an Answer.

Bird versus Hardwicke.

Case 98.

Eodem die.

THE Bill charged, that the Plaintiff having several great Quantities of Port Wine on board several Ships in the River, and the Defendant having likewise some of the same Wines, he on purpose to raise the Price of the Market, and to sell his own Wines at a better Rate, and unjustly to retard and obstruct the Plaintiff in the Sale of his, caused the Plaintiff's Wines to be seized

A Man is not bound to discover what may subject him to the Penalty of an Act of Parliament.

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as *French* Wines, and detained till the Defendant had sold all his own Wines; and that then the Defendant relinquished his Prosecution, well knowing that the Plaintiff's Wines were *Port* Wines, and not *French* Wines: And therefore it was prayed that the Defendant might answer the Premises, in order to the Plaintiff's bringing an Action on the Case for Damages.

The Defendant pleaded the Act for prohibiting of *French* Wines, and a penal Clause therein on any Man that should seize or cause to be seized any Wines, as *French* Wines, and afterwards compound the Matter or relinquish his Prosecution; and insisted that this Bill being to subject him to a Forfeiture, he was not bound to answer it:

The Plea was allowed.

Case 99.

Hanne versus Stevens.

Eodem die.

A Trustee for three Persons is called to an Account. All the *cestuy que* Trusts must be Parties.

THE Bill being to have an Account of a Trust, the Defendant pleaded he was intrusted for three Children, *viz.* for the Plaintiff and his two Brothers; and that the other two not being made Parties to the Suit, he was not bound to answer; for otherwise he might be thrice called to an Account for the same Matter.

The Plea was allowed.

Case 100.

Moore versus Hart.

Eodem die.

Coram Justice Charleton.

Father on a Treaty of Marriage of his Daughter does by a Letter written to a third Person agree to give

THE Bill being, That the Defendant intimating to the Plaintiff's Friends that he intended to give 4000*l.* Portion with his Daughter, and having made it appear, that he was able so to do, the Plaintiff with his Approbation became a Suitor to his Daughter: But after, when the Defendant understood that the Plaintiff had a real

real Affection for his Daughter, and that they had mutually engaged to Marry each other, then the Defendant began to recede from his Promise, and pretended he could not part with so much of his Estate at present, but would give his Daughter in Possession the Moiety of a Farm called *Creaton* at *Wapenham* in the County of *Norphampton*, (the whole being, as he pretended, worth 4000*l.*) and the other Moiety after his Death; if the Plaintiff would accept of such Portion; and did declare so much by Letter under his Hand, with an Intent to encourage the Plaintiff to marry his Daughter: But the Plaintiff, finding him to vary in his Proposals, acquainted his Friends therewith, and desired them to come to a Certainty with the Defendant touching the Portion he would give with his Daughter, if the Plaintiff should marry her: Whereupon a Letter was wrote to the Defendant by a Friend on the Plaintiff's behalf, desiring the Defendant to be plain, and to ascertain what Portion he would give the Plaintiff with his Daughter, if he should marry her: And the Defendant, about *January* 1680, came to this final Agreement touching the same, *viz.* that the Defendant should give and he did then promise and agree to give down upon the Marriage with his said Daughter to the Plaintiff 1500*l.* and to leave him 500*l.* more at his death, in case there should be any Issue of the intended Marriage; and did also agree, that both the Sums should be charged on his said Estate at *Creaton*: which Promises and Agreements were put into writing, and signed and subscribed by the Defendant: And he did in a Letter, in answer to the said former Letter, express and declare as much under his Hand.

1500*l.* Portion
with his
Daughter in
Marriage, this
is binding and
out of the Sta-
tute of Frauds.
Vid. Post Case
197.

That about *February* 1680, in pursuance of the Agreement, the Marriage was solemnized; and the Defendant often after, as well as before, declared he would perform his Promise and Agreement; and the Plaintiff upon his Marriage became justly intitled to the said Portion, and might well expect the same, it being but half of what the Defendant

fendant at first voluntarily undertook to give, and much inferior to the Plaintiff's Estate. That the Defendant refuses to pay the 1500 *l.* and 500 *l.* and pretends he never made any such Promise or Agreement *with the Plaintiff*, and thinks by that Nicety to avoid the Performance thereof: Whereas tho' the Agreement was not actually made with the Plaintiff, yet it was made with a Friend of the Plaintiff's on his behalf. That the Defendant pretends the Marriage was had without his Consent or Privity, and that whatsoever he wrote in any such Letter, the same ought not to conclude him, because it was not a full Agreement on both sides; there being no Provision for a Jointure; when as the Defendant never demanded any, well knowing his Daughter would be intitled to Dower: And whereas he pretends the Marriage was without his Consent; *that* was by his own Contrivance; for when he found the Plaintiff's Affection set on his Daughter, he contrived to have her marry the Plaintiff without his seeming Privity, and gave her Directions so to manage the Matter, that he might thence raise a Pretence to avoid Payment of the Portion; and was, and did acknowledge himself, well pleased with the Marriage, and knew when it was solemnized. That the Defendant at other times pretends, the Plaintiff's Estate deserves not so great a Portion, altho' he has owned by Letters and otherwise, that he esteemed the Proposals touching the Marriage as a great Honour to him; and declared his only fear was, he should not be able to give a Portion equivalent with the Fortune offered him: And at other times he pretends, he is not able to give 2000 *l.* Portion, altho' in truth he is seized of Lands of Inheritance of 4 or 500 *l. per Ann.* and threatens that he will secretly convey away all his Estate to prevent the Plaintiff's receiving the fruit of the Agreement: and therefore that the 1500 *l.* might be paid down, and the 500 *l.* secured, was the Bill.

To this the Defendant pleaded, that by an Act intitled *An Act for Prevention of Frauds and Perjuries*, made 29

nunc Regis at the Parliament begun at *Westminster* 18 die *Maij* Anno 13 *Regis nunc*, and from thence continued by several Prorogations to the 15th of *February* 1677, it was, amongst other things, Enacted, that from and after the 24th of *June* 1677 no Action shall be brought, whereby to charge any Person upon any Agreement made upon Consideration of Marriage, or upon any Contract or Sale of Lands and Hereditaments, or any Interest in or concerning them, unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be put into Writing, and Signed by the Party to be Charg'd therewith, or by some other Person thereunto by him lawfully Authorized, *Prout* the Act. And doth Aver, that neither he nor any other by him Authorized, did make, sign, or seal any Contract or Agreement in Writing to any such Effect or Purpose, as by the Bill is suggested, or any Note or Memorandum thereof, or of any Agreement to that Effect: And that the Plaintiff's Marriage was without his Knowledge, Privity or Consent, and without any Agreement in Writing made or concluded upon in reference thereunto. And therefore he pleads the said Matter in bar of the Plaintiff's Bill, and demands Judgment.

For the Plaintiff it was insisted, that this was no good Plea; for he has not at all answered to the particular Circumstances of the Case charged in the Bill, which will much influence the Case in Equity, which is strong here; the Agreement in this Case being already executed on one Side; and here he does not deny, that he wrote such a Letter as is mentioned in the Bill; but takes upon himself to judge, that such a Letter does not amount to a sufficient Note or Memorandum of an Agreement in Writing within the Act: And what he has said touching the Agreement is not by way of Answer, but only Averred in the Plea; so that if this Plea should stand we cannot Except, as we might to his Answer, where it is not full, whether he made such Agreement or not: And here he has Pleaded an Act of Parliament; whereas there is in Truth no such Act: for

Mispleading of
a publick Act
of Parliament.

he Pleads, that at a Parliament begun at *Westminster* 18 *die Maij*, *Regis nunc*, and from thence continued by several Prorogations to the 15th of *Feb.* 1677: Whereas the Act of *Frauds* and *Perjuries* was made at a Parliament begun the 8th of *May*, and not on the 18th, and was continued by Prorogation to *Feb.* 1676, and not to *Feb.* 1677: So that he has quite mispleaded the Act; and that must be fatal upon him: For *Pleas* and *Demurrers* are not to be more favoured in Equity, than they are at Law; it being here only to prevent answering: And besides, the Statute of *Frauds* and *Perjuries* being a publick Act, he will have the Benefit of it at the hearing: And tho' this is a publick Law, yet if he will take upon him to plead it Specially, and mistakes, it is as fatal to him as the mispleading of a private Act would be. And they cited the Case of *Love* and *Wotton*, *Cro. Eliz.* 245. where the Defendant had pleaded the Statute of *Usury* to be made 6 *die Feb.* 13 *Eliz.* whereas it was made 2 *die Feb.* And in that Case, tho' after a Verdict, and tho' the Plaintiff in his Replication had admitted there was such an Act, yet the Court unanimously declared, that the Statute against *Usury* being a publick Law, they were bound to take notice, there was no such Statute, as the Defendant had Pleaded; and so would not give any Judgment.

But *Justice Charleton* conceived, that Pleading ought not to be so strictly observed in Equity, as it was in Law. (*mes quere*) and disallowed the Plea upon the Merits; and said, he did not know, but a Man might make an Obligation in a Letter, if he put his Hand and Seal to it.

ON Monday, 18 Decemb, 1682. about four o'Clock in the Afternoon, died the Earl of Nottingham, Lord High Chancellor of England, having had the Custody of the Seal for more than nine Years, and being then sixty one Years of Age,

December 20, Sir Francis North, Lord Chief Justice of the Common Pleas, was made Lord Keeper, and had the Great Seal delivered to him at the Council Board on Wednesday Night, and the next Day kept a private Seal for Writs, at his House in Chancery-Lane.

On the 23d Day of January, being the first Day of the Term, the Lord Keeper took his Oath as Lord Keeper, which was Administred to him by the Master of the Rolls. And then Mr. Saunders was brought to the Chancery Bar, to take his Oath, as Serjeant at Law, had his Writ read, and prayed his Appearance might be recorded, and was then Sworn, and afterwards presented the Lord Keeper with a Ring for himself, and another for the King, inscribed, Principi sic placuit: And afterwards the Lord Keeper went into the King's Bench, and made a Speech to Mr. Saunders, and called him up to the Bench, and Swore him Chief Justice; and afterwards went into the Common Pleas, and made a Speech to the Lord Chief Justice Pemberton, who was removed from being Chief Justice of the King's Bench, to be Chief Justice of the Common Pleas.

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Termino S. Hillarii,

34 & 35 Car' II. 1682.

In CURIA CANCELLARIÆ.

Case 101.

11 Januar.

In Court
*Lord Keeper.*Motion to dis-
miss a Bill on
Payment of
20 s. Costs.*Anonimus.*

UPON a Motion made to dismiss a Bill (wherein Plaintiff had proceeded to an Answer only) with 20 s. Costs: *per Lord Keeper*, that was a Rule made at least 50 Years since; and he saw no reason, if a Defendant had been put to greater Charge, why he should not have his full Costs: And that for the future it should be referred to a Master to Tax the Defendant his Costs in such Case.

Case 102.

*Eodem die.*Motion for a
Messenger
upon a *Cepi*
Corpus return'd
by the Sheriffs
of London.*Vid. post Case*
143.*Anonimus.*

UPON a Motion for a Messenger upon a *Cepi Corpus*, the Defendant living in London, *Lord Keeper* said, this had been looked upon as a Motion of Course; but in truth it was grounded upon a Mistake; for to his Lordship's Knowledge, the Officers of the City have not their own Amercements: They have no Royal Amercements.

Williams

Williams versus Mellish.

Case 103.

UPON a Motion made by Mr. *Williams* on behalf of the Plaintiff his Brother, that Proceedings might be stay'd on the Decree, until the Plaintiff was heard on a Bill of Review: Mr. *Williams* insisted, that a Bill of Review was like a Writ of Error at Law, or an Appeal in the Ecclesiastical Court: and a Writ of Error at Law, till the Statute for special Bail, was in it self a Superfedeas: And that as to the Precedents in Court, he had looked into them, and found there was no constant Rule; for sometimes a Bill of Review had been allowed before the Decree had been performed; and at other times not.

15. Januar.
In Court
Lord Keeper.
The Plaintiff
not allowed to
bring a Bill
of Review,
unless he per-
formed the
Decree, or
would swear
he was unable
to do it, and
would surren-
der himself to
the Fleet; to
lie there, till
the Matter on
the Bill of Re-
view was de-
termined.

Lord Keeper. Even before the Statute for special Bail on a Writ of Error, the Writ was not such a Suspension of the Judgment, but that a Man might nevertheless have had an Action of Debt on it: But I do not think there is any sound Argument to be drawn from such Comparisons. In this Case the Decree shall be performed to a Tittle before any Bill of Review be allowed; unless the Plaintiff *Williams* will swear himself not able to perform the Decree, and will surrender himself to the Fleet; to lye in Prison till the Matter be determined on the Bill of Review.

Id. post Case
158.

Anonimus.

Case 104.

A Bill against a Corporation to discover Writings. The Defendants answer under their Common Seal; and so being not sworn, will answer nothing in their own Prejudice. Ordered that the Clerk of the Company, and such principal Members as the Plaintiff shall think fit, answer on Oath, and that a Master settle the Oath.

Eodem die.

Estwick versus Conningsby.

Case 105.

Eodem die.

Surviving Partner trading on his own Account with the Debtors to the Partnership.

Ordered, that an Attorney be Appointed to sue for the Debts, unless the surviving Partner would give Security to Answer a Moiety of the Debts to the Administratrix of the deceased Partner.

THE Plaintiff's late Husband (to whom she is Administratrix) and the Defendant being Copartners for many Years in the Trade of a Druggist, the Plaintiff's Bill was to have a Discovery of the Estate, and her Proportion and Dividend thereof according to the Articles of Copartnership. The Defendant Answered; and it appearing that many Debts owing to the joint Trade stood out, It was now moved on the Behalf of the Plaintiff, that an able Attorney might be appointed to sue for and recover these Debts; it being alledged in the Bill, that the Defendant carrying on a Distinct Trade for himself with the Persons that were Debtors to the joint Trade, to oblige them he forbore to call in their Debts; and it was Ordered accordingly, unless the Defendant within a Week would give Security to the Plaintiff to answer her Moiety of the Debts that were standing out.

Case 106.

Anonimus.

16 Januar.

In Court
Lord Keeper.

After a Decree for a Personal Duty a Sequestration issues, and then the Defendant Marries and dies.

If the Sequestration shall take place of the Wife's Dower.

Vid. post Case
157.

ON a Demurrer; the Plaintiff's Bill was to revive a Sequestration obtained against the Defendant's Husband for a Personal Duty before his Intermarriage with the Defendant, and to avoid the Defendant's Estate in Dower in the Lands, that were Sequestred before the Marriage, it being insisted that these Lands were so bound by the Sequestration, and covered therewith, that the Defendant's right of Dower could never attach them.

To this Bill the Defendant Demurred, and the Demurrer was allowed by the Lord Keeper. And the Council at the Bar desired to know his Lordship's Opinion, whether the Heir in Fee simple should in such Case have the Estate bound, and subject to such a Sequestration, or not? But

the Lord Keeper refused to declare his Opinion therein, saying, that Case was not now before him.

Arch-Bishop of York versus

Case 107.

18 Januar.

In Court
Lord Keeper.

UPON a Motion made by Mr. *Bellwood* for a Superfedeas to a Writ *de Cautione Admittenda*; for that they had taken a Writ to the Sheriff without any Affidavit filed, that the Bishop refused to Admit of Caution, and for that reason a Superfedeas was awarded. And the Lord Keeper declared, that finding this Court often troubled for Writs *de Cautione Admittenda*, he thought the Right of it was, that if there was a Sentence for a Man to pay Money, or to do any other thing in the Spiritual Court, a Man ought first to perform that, before he is admitted to his Writ *de Cautione Admittenda*: For it is in vain to take Security *Parere Mandatis Ecclesiæ*, whilst a Man refuses to obey the Sentence. *Sed Quære*. For suppose a Man be excommunicated for not coming to Church, or not receiving the Sacrament; how can he do that, till his Caution is admitted and he absolved?

No Writ *de Cautione Admittenda* ought to Issue, till Affidavit filed, that the Bishop refused to admit of Caution.

Anonimus.

Case 108.

Eodem die.

UPON a Motion made by Mr. *Stedman*, where three several Actions at One time were brought against an Executor, and he to each Action pleaded *Riens entermaines ultra* 100*l.* and so upon each Action there was a Judgment for 100*l.* and therefore prayed an Injunction, But it was denied by the Lord Keeper. In Cases proper for Law a Man must defend himself by Legal Pleadings; and every Executor ought to be careful in the first Place to cover all his Assets with a Judgment.

An Executor pleads, he has no Assets *ultra* 100*l.* to three several Actions. Judgment is had in each for 100*l.* upon which he brings his Bill and moves for an Injunction, which is denied.

Anoni-

Case 109.

*Anonimus.**Eodem die.*

Motion by the
King's Paten-
tees for an In-
junction to stop
the Sale of En-
glish Bibles
printed beyond
Sea.

UPON a Motion for an Injunction to stop the Sale of English Bibles printed beyond Sea, It was urged, that the *Chancery* was a Court of State, and therefore for the great Mischief that might arise from these Bibles, if they should be suffered to be publickly sold, the Sale ought to be prohibited by this Court, Upon that politick Account, as well as to quiet the King's Patentees in their Possession.

Lord Keeper. I do not apprehend the *Chancery* to be in the least a Court of State: Neither can I grant an Injunction in any Case, but where a Man has a Plain Right to be quieted in it: And, tho' the Patent for Law Books has been adjudged good in the *House of Lords*, yet that is not exactly the same Case with this, tho' near it.

Vid. post Case
274.

Let there be a Tryal at Law, and let the King's Patentees be Plaintiffs, and the Defendants admit they have sold *twelve* Bibles. And when the Tryal is over, come back again.

Case 110.

Anonimus.

23 Januar.

In Court
Lord Keeper.

UPON a Motion for an Injunction to stay Proceedings on a Bond, upon Offer made to give Judgment with a Release of Errors; But the Lord Keeper answered, that he did not think that so beneficial an Offer as it might be looked upon; for that notwithstanding the Release of Errors the Plaintiff might bring his Writ of Error and put the Defendant to plead his Release, and so delay time as long as if no Release of Errors had been given. But upon the Plaintiff's offering to be bound by Order to bring no Writ of Error an Injunction was awarded.

Gerrard

Gerrard versus Vaux.

Cafe 111.

Eodem die.

In Court
Lord Keeper.

THE Bill was to have an Execution of an Agreement. But upon the Proof it appearing, the Agreement was only, that the Defendant would quit the Possession of the Lands, and not that he would convey all his Estate in those Lands, the Bill was dismissed. But the Lord Keeper said, If the Agreement had been to have conveyed those Lands, altho' he was not apprised what Estate he had in them, yet he should have decreed the Agreement.

Agreement to quit the Possession of Land will not oblige a Man to convey.

Curson versus African Company.

Cafe 112.

Eodem die.

In Court
Lord Keeper.

IT was objected against the Plaintiff, that he had not brought proper Parties to hearing, the Bill being to be relieved for a Debt owing from the Old African Company, and they had brought to hearing the New African Company only.

Want of Parties.

The Lord Keeper objected, that the old Company were in a manner *in nubibus*, tho' their Charter was not surrendered, as was objected at the Bar, for he knew how that matter was. The old Company were almost Two Hundred Thousand Pounds in Debt; so that their Credit was lost, and they could not carry on their Trade; and therefore, that the Trade might not be lost to the Nation, it was necessary that a New Company should be erected, which was so done; and the King accepted no Surrender from the old Company of their Charter; But they are a Company still in being: the new Company (which in truth are almost all the same Men as were of the old Company) bought the old Company's Stock and Effects at the true Value, and the Mony was to be applied for Payment of the Debts of the old Company: But that,

which stuck with him in this Cause, was; he did not see how a Company that had no Estate could be compelled to appear. Upon which it was urged, the Plaintiff might take out a *Disfringas* against the Company, and have it returned *nihil*, and so get a Sequestration against them; and then by the Course of the Court the Plaintiff need not to bring them to hearing. But then for the Plaintiff it was said, that the Plaintiff had an Order made in this Cause that the Defendants should take no Advantage at the hearing for want of proper Parties: To which it was replied, such an Order was in it self void, and could not take away the Defendants just Exceptions, unless it had been by Consent.

Lord Keeper ordered the Plaintiff's Council to go on and open the Cause: And after Debate the Plaintiff agreeing to take, as other Creditors had done, 40 *l. per Cent.* with Interest for his Money, he was ordered so to do: and was likewise ordered to allow 100 *l.* Debt that was owing by him to the Company; for that it is the Custom of Companies, that if they owe a Man 100 *l.* they will give him Credit for so much; and therefore in respect of a Company, Stoppage is to be allowed as a good Payment.

Harvey versus Montague.

Cause 113.

26 Januar.

In Court
Lord Keeper.

Vid. ante Cause
53.

THE Cause was, Mr. *Harvey* being possessed of a great Personal Estate died, and made the Plaintiff Sir *Thomas Harvey* and Mrs. *Elizabeth Harvey* his Widow Executors, and directed by his Will that 20000 *l.* of his Personal Estate should be invested in Lands, and that Mrs. *Harvey* should receive the Profits thereof for her Life, and made Sir *Thomas Harvey* Residuary Legatee.

Sir *Thomas Harvey* Exhibited a Bill against Mrs. *Harvey*, setting forth that he was residuary Legatee, and yet Mrs.

Har-

Harvey had got the whole Estate of the Testator into her Hands, and converted it to her own Use.

Mrs. *Harvey* insisted on a Deed made during Coverture, whereby the greatest part of her Husband's Estate was settled in Trust for her. But Sir *John Coell* deposed, that this Settlement being made in the late Times was contrived only to prevent Sequestration; And that Cause coming on to be heard, she was decreed to Account to Sir *Thomas Harvey* for the Personal Estate, and that the Deed of Trust should be set aside, and she should receive no more of the Testator's Estate; upon which she goes into *France*, and refuses to Perform the Decree, and was under a Sequestration: afterwards Sir *Thomas Harvey* Exhibits a Bill against the now Defendant Mr. *Mountague*, setting forth, that he owing 10000*l.* and Interest on a Mortgage to Mr. *Harvey* the Testator, and that Mr. *Mountague* knowing of the former Decree, and having been present at the hearing of that Cause, and at the time when the said Decree was pronounced, had since, with an Intent to elude and avoid the Decree, paid this Money to Mrs. *Harvey*, as he pretended: Whereas if he had paid the Money, it was with Notice and after the former Decree, and therefore it was prayed, that Mr. *Mountague* might pay this 10000*l.* with Interest.

The Defendant insisted, that he had paid and fully satisfied all the Mortgage Money on such a Day in *July*, which was in time Subsequent to the Decree; and that he having paid it to a Person, that in Law was well Intitled to receive it, and having a Legal Discharge for the same, and being no Party to the former Decree, nor bound by it, nor ever served with any Order upon it, he ought not in a Court of Equity to be compelled to pay it over again.

This Cause came on to be heard before the Lord Chancellor Nottingham, in *Michaemas Term* last, and the Proof on behalf of the Plaintiff being, that the Defendant Mr. *Mountague* was an intimate Acquaintance of Mrs. *Harvey's*,
and

and one with whom she advised in the Management of her Affairs; and that he was present in Court at the time of the Decree pronounced, it was therefore held by the Court, that this was no good Payment: tho' for the Defendant it was insisted, that this was no legal Notice to Mr. *Mountague*; that he was no Party to the former Decree, nor bound by it, nor was ever served with any Order upon it: and that he now having really paid his Money (as the same was fully in Proof) and having a good and legal Discharge for it, it was a very hard and strange Demand in Equity to compel him to pay it again: and in truth that Clause in the Order, that Mrs. *Harvey* should receive no more of the Testator's Estate, was inserted in the Decretal Order by the Clerk, who drew up the Decree, and was not in the Minutes; nor directed by the Court: and the Decree is not, that no Person shall pay any Money to Mrs. *Harvey* (for that in it self would be a void Clause to all, that were not Parties to the Decree) but only, that she should receive no more: And if Mr. *Mountague* be decreed to pay this Money to the Plaintiff, he will not only be decreed to pay his Money twice, but in truth the Plaintiff will have a double Satisfaction decreed him: for by the former Decree Mrs. *Harvey* is to Account to him for all Moneys by her received, and is now under a Sequestration for it: and in truth the Plaintiff has received Satisfaction for it by the Sequestration, having under it not only received the Profits of the 20000*l.* which she was to receive for her Life; but also the Profits of 1500*l.* *per Ann.* which is her own Land of Inheritance; and that therefore these Decrees were repugnant, and did fight with one another.

But notwithstanding all that could be said, the Payment to Mrs. *Harvey* was decreed to be an Ill Payment; and it was referred to a Master to take the Account.

After this the Plaintiff got a Report *ex parte*, and Mr. *Mountague* having Petitioned, and moved by his Council for a Rehearing, was denied it: and then he moved to go back

back to the Master (this being but a Report *ex parte*) which at last was obtained: And it being alledged, that Mr. *Mountague* had paid Mrs. *Harvey* some Money for her Necessities before the first Decree, it was directed that what he had really paid, before the Decree, of the Principal or Interest should be allowed him on Account, and his own Oath to be taken as to the Interest.

When he came before the Master, he proved that he had actually paid 7500*l.* of the Principal Money, even before the first Decree pronounced; And the Master made his Report to that Effect.

And now the Matter coming before the Lord Keeper upon Exceptions to the Master's Report, the Proofs for the Defendant were made by one Mr. *Phalizo*, that the Defendant, just before he was recalled from his Embassy in *France*, had returned thither 5000*l.* in Money, which was left in *Phalizo's* hands, and had raised by the Sale of the Furniture of his House there the Sum of 2500*l.* more, which was likewise left in *Phalizo's* hands, and that the Defendant Mr. *Mountague* had Bills from *Phalizo* for payment of this Money; and that Mr. *Mountague*, before the first Decree pronounced, gave Orders to Mrs. *Harvey* to receive this Money of *Phalizo*, who swore, that thereupon he became her Pay-master; and that afterwards in time Subsequent to the first Decree, Mr. *Mountague* gave new Orders or Bills to Mrs. *Harvey* to receive this Money; and that thereupon, she having Occasion for it, he did actually pay it to her, and she with her own Hand indorsed on the Counter-part of the Mortgage the Receipt of this Money.

Hereunto for the Plaintiff it was Objected, That the Defendant could not be admitted to this Proof, it being contrary to his own Oath, who in his Answer had sworn the Money paid on such a Day in *July*. Secondly, That *Phalizo's* Deposition ought not to be read in this Case; for that he before the Hearing was examined in chief upon

an Interrogatory, that led him to discover the several times of the now pretended Payments; and that therefore he ought not to be examined to the same Matter again after the Hearing; for now Publication being passed, and the Defendant seeing where the Matter pinched, would supply it by straining of *Phalizo's* Evidence. If such a Proceeding should be allowed it would occasion Perjury, and especially in this Case, where *Phalizo* has sworn the Money paid in *July*. Thirdly, Admitting the Case to be according to this new Proof, yet in truth, this is no Payment, for Mr. *Mountague* might have revoked his Orders given to *Phalizo* for Payment of this Money to Mrs. *Harvey*; and the Money was not actually received till after the first Decree; and that Bills of Exchange are not Assignable, but by Indorsement only; and it carries a Suspicion with it, that there is no Witness, either to the Orders given to Mrs. *Harvey*, or to the Indorsement on the Mortgage Deed; and the Indorsement is not upon the Original Deed but on the Counter-part remaining in Mr. *Mountague's* possession.

To this it was Answered, that Mr. *Mountague's* Answer and *Phalizo's* former Depositions were very consistent with what was now proved before the Master; for tho' they swore the Mortgage was fully satisfied and paid on such a day in *July*; yet great part of the Money might have been paid before, as in truth it was, tho' the Compleating Payment was not made till *July*: and that the Plaintiff's Council could not be in earnest, when they Objected against *Phalizo's* being Examined after the Hearing; for that was never denied in matter of Account, and was so settled in the Case of *Sandys* and *Davison* in the Lord *Hyde's* time upon long Debate: and that Mrs. *Harvey* accepting of these Bills, and *Phalizo* swearing he then became her Paymaster, and her receiving the Money upon them afterwards, makes this a good Payment *ab initio*. That Mr. *Mountague* could not have so revoked his Orders, but that Mrs. *Harvey* might have required Payment thereof afterwards; and *Phalizo* might have justified his Payment thereof: And as to the

Indorsement's being made on the Counter-part of the Mortgage, the Defendant's Council conceived that was most proper; it being fit Mr. *Mountague* should have the Evidence for the Payment of his Money in his own hands: and tho' there was no Witness to it, yet it was fully proved to have been all writ with Mrs. *Harvey's* own hand: And it is an Evidence of the Sincerity of this Payment, and that it was not done with a design to have served a turn; for if so, Mr. *Mountague* might have easily removed all these Doubts. But the Lord *Keeper* allowed the Exceptions to the Master's Report, and ordered Mr. *Mountague* to repay the whole Money.

East India Company versus Sandys.

Cafe 114.

27 Januar.

In Court
Lord *Keeper*.

THE *East India Company* exhibited a Bill against the Defendant *Sandys* an *Interloper*, setting forth, their Patent for the Sole Trade to the *East Indies*, and the great Power that was thereby given them; And particularly the Clause in the Patent, that whosoever should trade thither, not being of the Company, should forfeit the Value of such Goods and Commodities wherein they should so trade; one Moiety thereof to the Company, and the other Moiety to the King: but they were willing to wave their Forfeiture: And setting forth what Places and Towns they had in the *East Indies*, and that they had there above 150000 Men under their Government; and that they had been at above 50000*l.* Charge in securing their Trade in those Countries, and that they had purchased divers Privileges of the *Princes* there; and that the Defendant, tho' he was not of the Company, had traded thither with the Plaintiffs Money, and under their Colours; And that by reason of his trading thither and bringing Goods and Merchandizes from thence, they had suffered great Damage, and were forced to sell their Goods at Lower Rates; and that the Defendant ought to answer Damages for the same. And that now to their further Prejudice the Defendant continued on his Trade in the *Indies*,

Injunction denied to stay an *Interloper's* trading to the *East Indies*, till the Validity of the *East India Company's* Patent has been tried.

Indies; and had laded a Ship called with Commodities to be transported thither, and prayed a full Discovery, &c.

To this Bill the Defendant answered, and demurred. By Answer he denied he traded with the Plaintiffs Money, or under their Colours; and that he did not know what had been done in the *Indies*; for that he was never there, &c. And for Demurrer, That the Bill tended to make the Defendant liable to a Forfeiture, as appeared by a Clause in the Company's Patent set forth in their Bill; And that of their own shewing, their Patent was a *Monopoly*, and in it self void, &c. And that he was not bound to discover whether he was sending any Goods to the *Indies*, or what Goods he had brought from thence, &c.

This Demurrer coming on to be argued before the Lord Keeper, for the Plaintiffs it was insisted, that this was only an Auxiliary Bill for a Discovery, in order to a legal Tryal; and that an Answer could not hurt the Defendant, for that the Plaintiffs by their Bill had waved the Forfeiture. That the Company had been of an ancient standing and long Continuance, and their Patents from time to time renewed, and confirmed by several succeeding *Kings*; and that the Antiquity of their Possession, which had not been till now of late Interrupted by these Interlopers, entitled them to the Protection of this Court; and that therefore it was but reasonable they should have an Injunction for quieting of their Possession; and that it was no *Monopoly*, as was pretended, for that they always licenced People to trade to the *East Indies*, tho' they were not of their Company, on Payment of a reasonable proportion of the necessary Charge and Expence, which the Company had been at for the Support of their Trade thither; and it was but natural Justice they should so do; as in the Case of *Sewers*; all are made to contribute, that receive Benefit by what is done by the Commissioners: And for Precedents, they insisted on the Case of the *East India Company* and *Foscue*, and the *Booksellers* Case; And that it was lately ruled

ruled in the *Exchequer*, in the Case of the *sixty Chancery Clerks* on a Bill to discover, whether they had paid the King's Duty; and there, tho' the Defendants demurred, as here, because it would subject them to a Forfeiture, yet they were made to Answer: and there has never any advantage been taken of such Forfeitures: it is but like a *Subpœna sub Centum librarum*.

But it was Answered, there was a great difference betwixt *Mandatory Writs* and *Patents* that create Rights; and the Plaintiffs saying in their Bill, that they will take no Advantage of the Forfeiture, will not protect the Defendant in an Action at Law: But if it would, the Plaintiffs can wave but a Moiety of the Forfeiture, and cannot wave the King's Moiety: and their Patent must, as against them, be taken to be good, even in that Clause of the Forfeiture, tho' may be it is the Weakest Clause of it. And it was further insisted, that this Patent was a *Monopoly*, and the Plaintiffs had very boldly inserted it in their Bill, and suggested, that by reason of the Defendant's Trading to the *East Indies* they had been forced to sell their Goods for little more than half what they were really worth; Which shew'd the Oppression of this Patent upon the People.

How far the Plaintiffs by their Bill waving a Forfeiture, when one Moiety thereof belongs to the Crown, will prevent a Demurrer.

Lord Keeper. I must in this Case be governed by Law, and the Validity of the Patent is properly triable there; and till it is determined there, I do not see, how I can grant an Injunction; tho' I am far from thinking the Patent void, which has been confirmed by so many succeeding *Kings*; and since there have been divers Parliaments, that have taken Notice of other Matters, but never reflected on this Patent as void or against Law.

The Reasons given, why this Bill should not be Answered, are chiefly *Three*.

First, That what the Plaintiffs complain of is but in nature of a *Trespas*, and for that they may have Remedy

at Law: But to that it may be answered, In some Cases even for a Trespass a Bill is proper enough in this Court; as where by the secret Contrivance of it a Man cannot easily prove it; as for instance, if a Man in his own Ground digs a Way under Ground to my Mineral, and the like: and so in this Case there is a Difficulty as to the Proof, the Matters for the greatest part having been transacted in the *East Indies*.

The *Second* Objection is, that it tends to subject the Defendant to a Forfeiture. I do not think there is much in that; for I take it, the Clause as to a Forfeiture is the weakest Clause in the Patent; and I believe many of the able Council that argue for the Company, never Perused the Bill; otherwise they would not have inserted some Matters, that had been better left out.

Whether the Patent to the *East India* Company be a Monopoly, or only a Regulation of Trade.

Thirdly, It is Objected, that this Patent is a *Monopoly*. Certainly in its Creation it was only a Patent of Regulation; for at first all People were at Liberty to come in; and Patents for Regulation of Trade are exempted out of the Statute: and if it be now reduced into fewer hands, and so become a *Monopoly*, it is hard to say when it became such. It is like the Vastness of the Buildings in *London* becoming a Nuisance: no One can say when first they became so, or which particular House first made it such. And it is to be observed the words of the Statute of *Monopolies* are, that there shall be no *Monopoly* within this Kingdom. What Influence that may have on this Case is worthy Consideration. I would therefore have this Matter first tried at Law, and for that purpose let the Defendant admit, that he has bought and sold *East India* Goods, that he brought from thence, to some certain Value; and when the Tryal is over, come back again; and if the Tryal go against the Defendant, he shall perfect his Answer on Interrogatories: But in the mean time let the Defendant put in an Answer without Oath, that thereby the Complainants may be intitled to the Benefit of a Commission to the *Indies* to examine their Witnesses there.

vid. the Case of the *East India* Company against the Interlopers. 2 Ch. Rep. 165.

Grahme versus Grahme.

Case 115.

29 Januar.

In Court
Lord Keeper.

Whether Bonds
of Resignation
are Simoniacal,

UPON a Motion to dissolve an Injunction granted to stay Proceedings in an Action on a Bond given by an Incumbent to his Patron, that he (the Incumbent) should resign on request, Lord *Keeper* said, he was not satisfied, that such a Bond was good in Law: The Precedents that were in the Case were not directly to the Point, whether such Bonds are Simoniacal or not: he therefore directed that the Plaintiff should declare on this Bond, and the Defendant plead Simony, and after that and Judgment at Law come back to the Court.

Dominus Rex versus Cary.

Case 116.

Vid. ante Case
51.

IN a Cause on the *Latin* side, on a Motion that the Defendant *Cary* might stand Committed for not Vacating his Letters Patents of *Reprizals*, It was moved by Mr. *Wallop*, that they might be at Liberty to bring a Writ of Error in the *King's Bench*. And cited *Dyer* &c. But the Lord *Keeper* said, all those Books were founded only on the single Opinion of my Lord *Dyer*, and that he thought the *Jurisdiction* of *Chancery*, even of the *Latin* side, not subjected unto, nor to be Controlled by the *King's Bench*; and that he would Injoyn all such Writs of Error.

This Court will
not allow Writs
of Error in the
King's Bench
upon Judgments in the
Petty Bag.

Dy. 315. 4.
4. Inst. 80.

Anonimus.

Case 117.

UPON a Motion for a Rehearing of a Cause, where the Decree was signed and inrolled by the late Lord *Chancellor*, the Lord *Keeper* asked Serjeant *Maynard*, if he knew any Law, whereby he could justify the Rehearing of a Cause signed and inrolled by his Predecessor, for that was to Vacate a Record. The Lord *Chancellor* himself

Inrolment of
a Decree may
be opened, if
the Inrolment
was gained by
Surprize, or
there is some
Irregularity in
it.

self was Master of his own Inrolments, and might upon his Memory know some Reason for rehearing of it; but he could not do it without there was some Surprize, or other Irregularity in the inrolling of it: But he said, he had a Privy Seal that enabled him to sign and inroll the Decrees pronounced by his Predecessor.

Cafe 118. *Franklin versus Thornebury: & è contra.*

29 Januar.
In Court.
Lord Keeper.

A Voluntary Deed cancelled, and the Lands being devised for Payment of Debts, and Debts paid under the Will, Q. Whether Equity will relieve in such a Cafe, since the Testator himself could not avoid such a voluntary Deed?

An Agreement by an Infant decreed against him, he having received Interest under it, after he came of Age.

In the same Cafe, an Agreement, being void as against an Infant, yet was decreed; the Infant having received Interest under it after he became of full Age.

Cafe 119. *Welden versus Dux Ebor': & è contra.*

Eodem die

Fine levied by a Mortgagee and 5 Years non claim will not bar the Mortgagor of his Equity of Redemption.

TO a Bill to redeem a Mortgage, *Welden* had pleaded a Fine with Proclamations and non claim for 5 Years. The Plea was over-ruled, the Mortgagee having a Right to retain the Land, till his Money was paid; and this was a new way of foreclosing a Man of his Equity of Redemption.

Cafe 120.

Hardham versus Roberts.

Eodem die

Defective Surrender for the Benefit of younger Children supplied in Equity.

ONE Point in this Cafe was, that a Man having by his Will made Provision for his younger Children out of some Copyhold Lands, but the Surrender having been made into the hands of one customary Tenant only, the Question was, whether this Defect should in Equity be sup-

supplied against the Heir: And it was decreed for the Plaintiffs, the younger Children; there being many Precedents in Court of the like nature.

Hulbert versus Hart.

Cafe 121.

5. Februar.

In Court.

Lord Keeper.

COPARCENERS make a Partition by consent; and the Lands of the one being of greater Value than the Lands allotted to the other, until an Estate for Life fell in: It was agreed, that that Coparcener who had the least Share should have a Rent of 20*l. per Ann.* issuing out of the Lands allotted to the other, to make her Share equal, and a Bond was given for securing the Payment of it; but this Bond for *Owalty* of Partition being made payable to him, his Executors or Administrators, the Question was, whether the Heir or Executor should have the benefit of this Bond.

Bond given by one Parcener to pay to the other Parceners, his Executors or Administrators, an Annual Sum during the life of *J. S.* for *Owalty* of Partition, shall go to the Executor, and not to the Heir.

It was admitted, if he had taken a Sum in gross in Consideration of the Inequality of Partition, that had been like selling so much of his Part; but here the Bond being to secure a growing Payment, the Heir that has the Land ought to have the Benefit of it.

Lord Keeper decreed it for the Executor; and barely upon this difference, that here was no Grant of a Rent, but a bare Agreement, and so he had his Election either to pay it or forfeit his Bond.

Matthews versus Newby.

Cafe 122.

6 Februar.

In Court.

Lord Keeper.

THE Bill being to have Distribution of the Legatory Part of the Personal Estate of a Citizen of *London* who died intestate; the Defendant the Widow and Administratrix pleaded that by the Custom of the City of *London*, if a Freeman dies intestate and without Issue, his

A Freeman of *London* dies Intestate, leaving a Wife and no Child.

Bill is brought against the Widow, who

M m

Widow

was Admini-
stratrix, for a
Distribution of
the Testamen-
tary Part.

Defendant
pleads that by
the Custom it
belonged to her
as Administra-
trix and was
not distributa-
ble by the Sta-
tute.
Plea allowed.

Widow ought to have her Widow's Chamber and a Moiety of the rest of the Personal Estate, and the Administrator the other Moiety; and set forth the Proviso in the Act of Distributions, that it should not prejudice the Custom of *London*, and that Administration of her Husband's Personal Estate was granted to her.

It was affirmed by the Council at the Bar, that it had been lately resolved in the *Kings Bench*, that the whole Estate of a Citizen of *London* was exempted out of the Act of Distributions. And thereupon the Plea was allowed. But whereas the Defendant had Demurred, for that Distribution ought to be made in the Spiritual Court, the *Lord Keeper* over-ruled the Demurrer; for that the Spiritual Court in that Case had but a lame Jurisdiction; And there being no negative Words in the Act of Parliament, he thought a Bill for Distribution very proper in this Court.

Note, It was decreed by the Lord Chancellor *Jeffreys* in *Trin.* Term 1687, in the Case of *Stapleton* and *Sherrard*, where a Man within the Province of *York* was dead Intestate, leaving a Wife and no Child, that the Wife should have one Moiety of the Personal Estate by the Custom, and that the other Moiety being without the Custom should be distributed according to the Statute of *Distributions*.

Case 123.

Eodem die.

Howard versus *Howard*.

Bill for a Distri-
bution proper
in this Court.

BILL for a Distribution of an Intestate's Personal Estate. The Defendant demurred, for that Distribution of an Intestate's Personal Estate is proper in the Spiritual Court, and not here.

The Demurrer was over-ruled for the Reasons in the last Case.

Dumny

Dunry versus Filmore.

Case 124.

Eodem die.

A Bill having been taken *pro Confesso*, a Bill of Review was brought, and a Demurrer having been put in to it, was allowed: and now a new Bill of Review being brought the Defendant Demurred, and for Cause shewed, that a Bill of Review lies not after a Bill of Review: and the Demurrer was allowed.

A Bill of Review lies not, after a Demurrer to a former Bill of Review allowed.

Vid. post Case 126.

Earl of Arglasse and Muschamp.

Case 125.

Eodem die.

THE Defendant *Muschamp* had Petitioned the Lord Keeper for a Rehearing of his Plea to the Jurisdiction of the Court, and Mr. *Wallop* in Arguing insisted much on the Case of the *Company of Horners in London*, 2 *Rolls Rep.* 471. where this Court would not meddle with the Trust of Lands in *Chester*, tho' the Party was out of the Jurisdiction of the County *Palatine*, and cited the Lord *Derby's Case*; and therefore much less ought it to anticipate the Jurisdiction of the *Chancery of Ireland*. *Sed non allocatur*. And the Plea was over-ruled again, the Lord Keeper citing only *Preston* and *Archer's Case*: and as to the Objection, that this Court was deficient in Power in this Case to Compel a Performance of its Decree, because it could not sequester the Lands in Question, he looked upon that as an Objection of no weight; and it did not appear to him, but the Defendant might have other Lands in *England*; and then those would be subject to a Sequestration; and therefore over-ruled the Plea.

Vid. ante Case 70. Vid. post Case 231.

12. Co. 114.
1. Ro. Ab. 374.

Price versus Keyte.

Case 126.

Eodem die.

IN a Bill of Review you may add a new supplemental Bill.

Ante Case 124.

Anoni-

Case 127.

Anonimus.

A Man swears
he received
Mony as a
Menial Servant,
and paid it over
to his Master.
He shall not
Account for it
again.
Vid. ante Case
81. & post Case
204.

IF a Man by Answer swears, that what he received, he received as a Menial Servant, and hath paid it over to his Master, he shall not be put to Accompt again: But he ought to disclose this Matter in his Answer.

Hobbs versus Norton: & è contra.

Case 128.
9 Februar.

In Court

Lord Keeper.
Issue in Tail
under a Settle-
ment encoura-
ges a Stranger
to purchase an
Annuity of the
younger Son
given by the
Father's Will.
Decreed to
confirm the
Annuity.

2 Ch. Rep. 128.

SIR *George Norton's* younger Brother having an Annuity of 100 *l. per Ann.* charged on Lands by his Father's Will, contracts with Mr. *Hobbs* for selling to him this Annuity. Mr. *Hobbs* goes to Sir *George Norton*, and tells him he was about to buy this Annuity of his younger Brother, and desired to know of him, if his younger Brother had a good Title to it, and whether his Father was seized in Fee at the time of the making the Will, and whether the Will was ever Revoked; Sir *George Norton* told him, he believed his Brother had a good Title to it, and that he had paid him this Annuity these Twenty Years, but withal told him, that he heard there was a Settlement made of his Father's Lands before the Will; and that the said Settlement was in Sir *Timothy Baldwin's* hands, and that he had never seen it, and therefore could not tell him what the Contents of it were, but encouraged him to proceed in his Purchase; telling him, he had not only paid his Brother his Annuity to that time, but had paid to his Sisters 3000 *l.* under the same Will. Afterwards Sir *George Norton* gets this Settlement into his hands, and would avoid this Annuity, the Lands being thereby Intailed. *Hobbs's* Bill was to have this Annuity decreed, or Repayment of his Purchase Mony.

The Cause coming on to be heard, there was no Proof that Sir *George Norton*, at the time he encouraged *Hobbs* to proceed in this Purchase, had any Notice of this Settlement.

ment. But one Witness swore, that Sir *George* promised to confirm the Annuity to *Hobbs*: But that being but by one Witness, and contrary to Sir *George Norton's* Answer, was looked upon as no Evidence; it not being probable that Sir *George* should agree to confirm this Annuity, for then he would have been made a Party to the Deed.

Lord Keeper decreed the Payment of the Annuity, purely on the Encouragement Sir *George* gave *Hobbs* to proceed in his Purchase, and that it was a negligent thing in him not to inform himself of his own Title, that thereby he might have informed the Purchaser of it, when he came to enquire of him: And therefore decreed Sir *George* to confirm the Annuity to *Hobbs*:

But as to the Case between Sir *George* and his younger Brother, that might admit of another Consideration, being it was in Proof in the Cause, that the younger Brother all along was knowing of this Settlement, and therefore possibly he should not have Advantage of drawing in a Stranger to purchase his Title: But the Cause between them not being ready for hearing, was left to come on, as it could, by the Course of the Court:

*Vid. Case of
Bovey and
Smith. Case
139.*

Prodgers versus Phrazier.

Case 129.

THIS Day upon debating the Matter before the Lord *Keeper*, he refused to change the Possession, or to do any thing in it, until the Validity of the Patent was determined in a legal Tryal; and therefore directed the Plaintiff to bring his Ejectment *Custodiæ* to be tried in the *King's-Bench* next Term: And the Defendant to admit the Plaintiff was once in Possession.

*Eodem die.
In Court
Lord Keeper.
Ante Case 7.*

Exton versus Greaves.

Case 130.

Eodem die.

In Court.

Lord Keeper.

After a Decree to foreclose the Mortgagor and some Creditors, whose Debts were charged on the Estate, one of the Creditors pays off the Mortgage, and agrees with the rest, that they should redeem him at a further Day; otherwise he should hold the Lands absolutely.

This gives the other Creditors a new Redemption; and accordingly a Redemption decreed, tho' after 20 Years Possession and great Improvements made.

J. D. having made a Mortgage to *J. S.* and the Mortgaged Premises or the Equity of Redemption thereof being subjected to the Payment of divers Debts, the Mortgagee exhibits his Bill against the Mortgagor and all the Creditors, that they should redeem or be foreclosed. The Cause was heard, and at the time the Creditors and Mortgagor were to pay the Mortgage Money or be foreclosed, the Defendant *Greaves* by Consent of the Creditors (being a Creditor himself) pays the Money, and agrees with the Creditors, that if they would pay his Money at a further Day, they should redeem him; otherwise that he should have the Lands absolutely.

The Creditors fail to pay the Money at the time agreed on. *Greaves* for 20 Years together enjoys the Lands, and lays out 800 *l.* in Building; and now the Creditors exhibit their Bill to redeem him.

For the Plaintiff it was insisted, that this was but a Mortgage in *Greaves*; and that it did not stand upon the same Foot as in the former Decree; But that upon the later Agreement there arose a new Equity of Redemption to the Creditors.

For the Defendant it was insisted, that he came in and stood in the place of the Mortgagee, and if the Mortgagee had not assigned to him, all these Creditors had been foreclosed by the Decree; and insisted on the length of time: And principally, that this was in no sort like the Case between a Mortgagor and a Mortgagee: For there the Mortgagee had a Covenant for Payment of his Money, and a Bond most commonly for performance of Covenants: But here the Defendant *Greaves* had no way to compel the Creditors to pay him his Money; and that

a Mortgage ought to be mutual: As one may compel to receive; so the other may compel to pay: And it would have been looked on as superfluous and fantastical, for the Defendant to have exhibited a Bill to have foreclosed these Creditors.

But the *Lord Keeper* decreed a Redemption; because these Lands by the new Agreement became a Mortgage in respect of the other Creditors in the Hands of the Defendant, and in regard of the Trust and Confidence which they had in the Defendant, being all Creditors alike: And principally because the Mortgagee had assigned to *Greaves* his Mortgage only, and not the benefit of the Decree for foreclosing of the Redemption: And directed an Account to be taken, and the Defendant to be allowed only necessary Repairs and lasting Improvements.

Lord Keeper & al' versus Wyld & al'.

Case 131.

9 Februar.

*At the Rolls.
Master of the
Rolls and Lord
Chief Justice
Pemberton.*

THE Plaintiffs being Mortgagees, the Bill was to discover Settlements, and what Estate the Mortgagor had in him. To this Bill the Defendants pleaded two several Settlements, whereby the Mortgagor was only Tenant for Life.

Defendant
pleads Settlements made after Marriage, in pursuance of an Agreement made before, and does not shew what the Agreement was.
No good Plea.

The Plea was over-ruled, because the Defendants did not offer by way of Answer to admit the Tenant for life to be dead; that so the Plaintiffs might try the Validity of these Settlements at Law; for if they should expect, till the Tenant for life was dead, their Witnesses, that could prove the Fraud, might be likewise dead. Besides, the Defendants pleaded these Settlements to be made after Marriage, in pursuance of Promises and Agreements made before Marriage, and did not set forth what those Promises and Agreements were.

Case 132.

Eodem die.

*At the Rolls.
Master of the
Rolls.**Bill against
three for a
joint demand,
one of them
by Answer says,
he believes and
hopes to prove
the Debt paid.**The Cause is
heard on Bill
and Answer as
to him.**The Plaintiff
could have no
Decree; but on
Payment of
Costs had leave
to reply.**Barker versus Wyld and two others.*

THE Plaintiff's Bill was to have an Account of Goods delivered to the three Defendants respective Testators; who were Factors. In this Case there being three Defendants, one whereof had by Answer sworn, he believed and hoped to prove the Plaintiff was satisfied his Demands; the Plaintiff replied to the other two only; and brought the Cause on by Bill and Answer as against the other Defendant.

It was insisted, that the Plaintiff in this Case could have no Decree: for having brought on his Cause as against the third Defendant on Bill and Answer only; his Answer must be taken to be true: and tho' he does not directly swear the Mony paid; yet he says, he believes and hopes to prove it paid: But the Plaintiff not replying to him, he is excluded of the Benefit of his Proof: and this was a cunning Practice of the Plaintiff to proceed against those Defendants only who were Ignorant of the Matter, and to exclude the Defendant who perhaps could have proved the Debt paid.

The Plaintiff was Ordered to pay Costs, and left at Liberty to reply to the other Defendant.

In this Case it was admitted, that if there are three joint Factors, and a Man has a Demand against them jointly, a Bill against any one of them for the whole Duty shall be good; and that there are divers Precedents of it. *Sed Q.* if it be not only, where the other Factors are beyond Sea.

Thorne versus Thorne.

A Man had by Indenture mentioned to grant Enffcoffe and confirm his Land unto Trustees to stand seized to the Use of his three Brothers in Consideration of Blood, Natural Love and Affection; but it happened this Deed was never Executed with Livery. The Question was, whether it should work as a Covenant to stand seized: And it was decreed by the Lord Keeper without any Difficulty. The like Judgment was cited in the Case of *Crossing* and *Scudamore*: and in the present Case, tho' it was not taken Notice of, there was an exprefs Covenant, that the *Cestuy que* trust should enjoy according to, and for, and during the Estates thereby respectively limited.

Case 133.

23 Februar.

In Court
Lord Keeper.

A Feoffment without Livery to Trustees to stand seized to the Use of a Brother amounts to a Covenant to stand seized.

1 Vent. 137.

2 Lev. 9.

1 Mod. 175.

In this Case the Settlement was with Power of Revocation, and subsequent to the Deed the Grantor had made a Mortgage in Fee to the Defendant, who was one of the Brothers. The Court held this to be a Revocation *pro tanto* only.

Settlement with power of Revocation. Subsequent Mortgage a Revocation *pro tanto* only. *Vid. ante Case* 84.

Batty versus Lloyd.

THE Defendant had agreed with the Plaintiff, who was to have an Estate fall to her after the Death of two old Women, to give her 350*l.* in Consideration of being paid 700*l.* at the Death of the two Women, and the Plaintiff was to secure this 700*l.* on a Mortgage of her Reversionary Estate.

Case 134.

Eodem die.

In Court.

One intitled to an Estate after the Death of two old Lives, takes 350*l.* to pay 700*l.* when the Lives fall, and Mortgages the Estate as a Security.

No Relief

against this Bargain tho' both the Lives died within two Years.

Vid. post Case 161.

It happened that both the Women died within two Years afterwards. And now the Bill was to be relieved against this Bargain. *Sed non allocatur*; tho' the Case of *Nott* and *Hill* was cited, where Relief was given in such a Case as this; the Plaintiff in that Case being prevailed upon thro' his Necessities.

Lord Keeper. I do not see any thing ill in this Bargain. I think the Price was the full Value, tho' it happen'd to prove well. Suppose these Women had lived twenty Years afterwards, could *Lloyd* have been relieved by any Bill here? I do not believe, you can shew me any such Precedent. What is mention'd of the Plaintiff's Necessities, is, as in all other Cases. One that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich Man a piece of Ground that lay near mine, for my Convenience, he would ask me almost twice the Value: So where People are constrained to sell, they must not look to have the fullest Price: As in some Cases that I have known, where a young Lady that has had 10000*l.* Portion payable after the Death of an old Man or the like, and she in the mean time becomes Marriageable, this Portion has been sold for 6000*l.* present Money, and thought a good Bargain too. It's the common Case; pay me double Interest during my Life, and you shall have the Principal after my Decease.

Case 135.

Eodem die.

In Court.

A obtains a Decree for 2700*l.* against *B*, who appeals to the *House of Lords*, where the Decree is affirmed, and *B*, on Petition obtains an Order for a Rehearing, and immediately falling ill, makes his Will, and devises his Lands for Payment of his Debts.

Decreed that after all the other Debts were satisfied, *A* should be paid his Debt.

Norden versus Norden.

ONE *Hollis*, that had a demand of 500*l.* against *Norden*, and had run it up to 2700*l.* obtained a Decree for it in this Court. *Norden* appealed to the *House of Lords*, where the Decree was affirmed. It was observed that *Norden* at the pronouncing of this Decree in the *House of Lords* fell down in a Swoon, and within a Week afterwards died, as supposed of Grief: But he first got a Petition answered for a Rehearing; and in his Sickness devised all his Lands for Payment of his Debts: And now *Hollis* would come within this Trust to have Satisfaction of his Debt.

Lord Keeper. It can't be supposed that a Man who denied your Debt upon his Oath, and died your Martyr in his Cause, should ever intend you should have the Benefit of

of this Trust. Suppose a Verdict had passed against a Man, and he should bring an Attaint, and pending this Suit he should make such a Settlement for Payment of his Debts: Would any Man say, that he ever intended the Debt recovered by the Verdict should be satisfied out of it? However at length he decreed, that after all Debts upon simple Contract were paid, *Hollis* should come in and be paid his Debt, if he could find Assets.

Lord Paget versus Read.

Cafe 136.

1 Martii.

*In Court
Lord Keeper.*

SEVERAL Goods were devised to Mr. *Read's* Wife for life, and after her Decease to the Lord *Paget*. In this Cafe, altho' Mr. *Read* and his Wife were parted, and there had been great Suits for Alimony, and she during the Separation had wasted these Goods: Yet the Lord *Keeper* thought it reasonable, that the Husband should be charged for this Conversion of the Feme; the Lord *Paget's* Title being paramount the Feme, and not under her.

Husband, tho' parted from his Wife, charged in Equity with his Wife's wasting of Goods, which were devised to her for her Life only.

Harding versus Edge.

Cafe 137.

Eodem die.

In Court.

UPON a special Report the sole Question was, how a Duty decreed should take place in Relation to other Debts in point of Priority of Satisfaction; and ordered, that a Decree should precede Debts on simple Contract and Bonds, and take place next to Judgments. And the Cafe of *Parker* and——was cited, where it had been so resolved: And as to the Objection, that in Debt upon a Bond at Law an Executor could not defend himself by Pleading he had no Assets, *ultra* what would amount to satisfy the Decree; it was answered, he might defend himself by a Bill in this Court, which would take care to protect him therein.

Debt by a Decree shall be paid after Judgments, and before Debts by Bond.

Palmer versus Jones.

Case 138.

Eodem die.

In Court

Lord Keeper.

Trustee not to
be charged
with imaginary
Values, but
only as a Bayliff.

THIS Cause coming to be Reheard, the Lord Keeper thought the former Decree too severe upon Doctor Jones the Trustee; and declared he would never Charge a Trustee with imaginary Values; but that he should be Charged as a Bayliff only. He thought it a great Hardship, that a Trustee was allowed nothing for his own Labour and Pains. It was Answered that it had often been Complained of in Court as too hard a Rule to Charge a Trustee with what he had made, or might have made, without his wilful default; but the Court could never yet find where else to fix a Measure.

The Lord Keeper said, that very supine Negligence might indeed in some Cases charge a Trustee with more than he had received, (as he remembered the Case of *Hollis* and *Mountague*) but then the Proof must be very strong.

For the Plaintiff it was urged, that this Case had one unusual Circumstance, for here the Trustee had expressly Covenanted to set and let the Land, and upon other Terms would not have been admitted into the Trust; yet for eight Years together he had kept the Land in his own hands &c.

After Debate the Plaintiff was glad to remit good part of what he had by the former Decree. And so the Matter ended by Compromise.

Bovey versus Smith.

Case 139.

2 Martii.

In Court

Lord Keeper.

Vid. ante Case
58 & 74.

THE Case was, Mrs. Bovey the Plaintiff's Mother living in *Holland*, and tho' a Feme Covert, yet Traded as a Feme sole; and having acquired to herself a
sepa-

separate Estate, about forty Years since made her Will in Dutch, and thereby Devised her Houses in Chelfea, which she had purchased with her Capital, to William Bovey, her Husband's Son by a former Venter, and two other Trustees and their Heirs, in Trust for her four Daughters and their Children and such of their Children as should be alive at the last; and afterwards by her said Will declares the Trust of all her Estate thereby undisposed of to be for her and her Heirs. The Plaintiff claims as Heir to his Mother, his Elder Brother not being of the whole Blood; but by a former Venter.

Before the making of this Will Mrs. Bovey had settled these Houses by Deed executed in her Life-time on the same Trustees, in Trust for such Persons and such Estate, as she by any Writing under her Hand and Seal should direct and appoint.

William Bovey and the other Trustees apprehending that this Devise carried the Inheritance of these Houses to the Daughters, in 1652 sell the Inheritance thereof for a full and valuable Consideration: And the Mony is proportionably distributed amongst the Daughters, the Plaintiff being privy to the Conveyance, and making no Claim, or pretending any Right to these Houses, and a Fine is levied of them, and five Years pass. Afterwards Differences arising betwixt the Plaintiff and William Bovey the Trustee, there is an Award made, and 200*l.* awarded to be paid the Plaintiff, and the Plaintiff to give a general Release of all Actions Real and Personal; but no Notice is taken in the Award of the Breach of Trust. The 200*l.* is paid the Plaintiff, and a general Release given accordingly.

About ten Years afterwards, William Bovey the Trustee for a full Consideration purchases back these Houses to himself and his Heirs; and the Defendant Smith standing in the Place of Bovey the Trustee, and the Plaintiff having now taken Advice upon this Will, and conceiving the Daughters

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took

took only an Estate for Life, exhibits his Bill to have an Execution of this Trust, and these Lands decreed to him.

The late *Lord Chancellor* had twice heard this Cause, and decreed it both times for the Plaintiff: But the Decree not being signed and inrolled, the Cause came this Day to be reheard before the *Lord Keeper*.

For the Defendant it was insisted, this was not only a very old and stale Demand, (the pretended Breach of Trust having been committed above thirty Years since) But a very hard Demand in Equity, to charge a Trustee, who according to the best of his Skill had in this Case acted honestly; and to evict the Land from him, who was now become a real and innocent Purchaser thereof.

And *first*, as to the Will itself, it was observed, that the same was made in *Dutch*, and the Original was lost, and a small Mistake in the Translation might make a great Variance in it; for if it had been *Issue* instead of *Children* it would have carried an Estate Tail; and the Custom in *Holland* may be, that those Words carry an Inheritance there: And the Will being in truth incoherent, and almost insensible in it self, if the Matter had been called in Question within any reasonable time, the Intent of the Testator might have been made out by Proof, which might have given light to the doubtful and ambiguous wording of the Will, and by which the Intent of the Testatrix might have better appeared: But here has been an Acquiescence in the Plaintiff for above *thirty* Years: Whereas had he soon laid Claim to this Estate, the Defendant might in Equity have compelled the Daughters to have refunded the Money received by them out of this Estate.

Secondly, It was insisted, that the Fine with Proclamations and non Claim for five Years was a flat Bar to the Plaintiff in this Case; and cited Cases, wherein it had been

been resolved, that no other Claim than the exhibiting a Bill, and taking out a Subpœna was a sufficient Claim in Equity; as a Man at Law must file an Original, where he cannot enter.

Thirdly, That the Release being general of all Actions real and personal, it released the Breach of Trust, if any were; and it being full within the Words of the Release; after so many Years it ought not now to be enquired into, whether this Breach of Trust was intended to have been released thereby.

Fourthly, If there was any Notice of the Trust in this Case, it was at most but a Notional Notice; for both the Plaintiff and the Trustee apprehended, that this Will carried the Inheritance to the Daughters.

Fifthly, It was observed, that this was a Declaration of a Trust only, and not the Limitation of an Estate; and that therefore there was a greater Latitude left to the Court in judging upon this Case; and that in many Respects it ought to have an equitable and favourable Construction.

For the Plaintiff it was answered, that tho' the Will was in *Dutch*, and tho' it might be such as by the Law of the *Low Countries* would carry an Inheritance; (tho' what the Custom of the *Low Countries* is, does not appear) yet that is nothing to the purpose; for a Will to pass the Inheritance of Lands in *England*, wheresoever it is made, must be such, as will carry an Inheritance according to the Laws of this Realm; as has been resolved in Case of *Latin Wills*, and the like. And the Devise being concerning Lands, the whole Will must be in Writing, and the Intent of the Testator cannot be supplied by Proof. And as to the Plaintiff's Acquiescence under this Breach of Trust, it is easily answered; for the last of the Daughters died not above two Years before the Bill exhibited; and tho' the
Re-

Remainder Man may, if he will, take advantage of the Forfeiture of the Tenant for Life presently; yet he is not bound to do it; but shall have five Years after the Death of the Tenant for Life to make his Entry or Claim. And the Plaintiff's Bill in this Case is very proper to have the Land it self decreed, for tho' the Plaintiff may have Satisfaction in Damages, yet the Land being now come to the Trustee again, the best and equalest measure is to decree him to convey the Land it self: And they cited the Lord *Canmore's* Case, where a Trust was broken, and then a full Bar to the *cestuy que* trust, and yet the Land coming afterwards into the Trustee's hands, he was decreed to convey the Land it self, as the best measure that could be taken in that Case. And the Plaintiff's Council did insist, that there was not any Bar at all to the Trust, as this Case was: For *first*, as to the Release, a Release shall never bar a Man, who is ignorant of the Right and Interest he is to release, and where such Right is suppressed and concealed from him: And in this Case the Plaintiff was not apprised, that any thing passed to him by this Will.

Secondly, Tho' the Release be general of all Actions real and personal, yet it was made in pursuance of an Award, which concerned Matters in Account between the *cestuy que* trust and the Trustee only: And it is not, nor can be pretended in this Case, that the Plaintiff hath received any Satisfaction for his Interest in these Houses.

Thirdly, All the three Trustees joined in the Conveyance, and so were all guilty of a breach of Trust; and yet this Release is made to one of them only; whereas if it had been designed to have released the breach of Trust, it would have been made to them all.

Then as to the Fine, it's true a Fine will bar an equitable Right, as well as an Estate at Law; but then the Estate must be displaced, which here it is not; the Fine being by and between the Parties to the Trust only, who having

Notice of the Trust, the Fine Operates so, as to strengthen the Trust, and not to extinguish it; the Trust being all along incumbent on the Land, and Passing with it: and so this Case is in truth stronger than that Case of the Lord *Canmore*, for here was never any real Bar: And in this Case it was impossible any one should come at the Land, but they must have Notice of the Trust; for they Purchase under the Will, and all their Title is by the Will, by which the Trust is created: and a Man that has Notice of the Will must at his Peril take Notice of the Operation and Construction of the Law upon it; and tho' this be called a notional Notice, yet it is such a Notice, as has always been allowed to be good; for every Man is presumed to be conversant of the Law of the Realm, and he shall not take Advantage of his own Ignorance, but *Carveat Emptor*.

For the Defendant it was only replied, that here was no Answer given, as to the Plaintiff's Acquiescence, and coming so late; for there was no Survivorship in the Case; for the Jointure was severed by the Fine, and all but one of the four Daughters dead almost ten Years before the Bill.

The Lord Keeper in the Debate put this Case to *Serjeant Maynard*. *A* seized in Fee in Trust for *B*, for full Consideration conveys to *C*, the Purchaser having Notice of the Trust; and afterwards *C*, to strengthen his own Estate, levies a Fine. Whether *B* the *Cestuy que* trust be not in that Case bound to enter within *five* Years? and the Council were all of Opinion, that he was not: for here *C* having Purchased with Notice, notwithstanding any Consideration paid by him, is but a Trustee for *B*; and so the Estate not being displaced, the Fine cannot bar.

Lord Keeper. In this Case you come here in Equity, after one and thirty Years Possession to affect an Estate with a Trust, notwithstanding a Release and Fine, and that upon a Supposál that Mrs. *Bovey* made no other Appointment

(as she had Power to do by the Deed) and after so long a Possession it ought rather to be Presumed she did: and also upon a Supposal, that this is a true Copy of the Will. This is only a Translation, and the Original lost, and the difference in point of Translation betwixt Children and Issue is nice, and the Question is, who shall suffer; for the Defendant is a Purchaser and has paid a full Consideration, and here must be affected with a notional Notice only; and the Plaintiff all the while stood by, and was silent, and at best was Passive in the breach of Trust:

Ante Cafe 128. and this Cafe is rather stronger than Sir George Norton's Cafe, where the Heir stands by, and encourages a Purchaser, and afterwards trumps up a Deed of Entail. Tho' it be hard to Dismiss the Bill after two Decrees for the Plaintiff, yet I am not satisfied I can Decree it for him.

The Bill must stand dismissed.

Cafe 140.
Eodem die.

In Court
Lord Keeper.

Scrivener puts out Money on Bond, and receives the Interest from time to time, and then receives part of the Principal, the Bond remaining in the Obligee's Custody.

No good Payment.

Roberts & al' versus Matthews & al'.

THE Cafe was, the Defendant *Matthews* employed one *Smith* a Scrivener to place out 50*l.* for him at Interest, which the Scrivener did to the Plaintiff, and took the Plaintiff's Bond for it in the Defendant's Name; and about three Months afterwards delivered the Bond to the Defendant. Plaintiff *Roberts* all along paid his Interest to the Scrivener, and about five Years after the Entering into this Bond the Scrivener calling upon him for the Principal, he paid 30*l.* of it, and the Scrivener not having the Bond in his Custody, gave the Plaintiff a Receipt for 30*l.* received in part for the Use of the Defendant *Matthews*.

Adjudged this was a void Payment; for the Bond being in the Custody of the Defendant *Matthews*, and not in the Scrivener's, the Plaintiff ought to have seen his Money indorsed on the Bond: And tho' this alone were enough

to

to make it an ill Payment, yet this Case was the stronger; for that the Plaintiff was not ignorant whose Money it was; the Receipt he took for the Payment of the 30 *l.* being for the use of the Defendant. And many Precedents were cited to the same Purpose.

Hollis versus Whiteing.

THE Bill was to have the Execution of a Parol Agreement for a Lease of a House, setting forth that in confidence of this Agreement the Plaintiff had laid out and expended very considerable Sums of Money, &c.

The Defendant pleaded the Statute of *Frauds* and *Perjuries*, and the Plea was allowed. But the *Lord Keeper* was of Opinion, that if the Plaintiff had laid in his Bill, that it was part of the Agreement, that the Agreement should be put into Writing, it would alter the Case, and possibly require an Answer.

Case 141.

Eodem die.

In Court
Lord Keeper.

Bill for an Execution of a Parol Agreement for a Lease of a House to Plaintiff, who in Confidence of the Agreement had laid out Money.

Defendant pleaded the Statute of *Frauds*, &c.
Plea allowed.

Vid. post Case
148.

If it had been laid to be part of the Agreement, that the Agreement should be put in Writing, whether Defendant must not have answered.

D E

Termino Paschæ,

35 Car' II. 1683.

IN CURIA CANCELLARIÆ.

Alderman Backwell's Case.

Case 142.

16 Aprilis.

*In Court**Lord Keeper.*

2 Ch. Rep.

190.

Granting a
Commission of
Bankruptcy is
not discretio-
nary but *de jure*

SEVERAL of the Creditors of *Alderman Backwell* having this Vacation petitioned for a Commission of Bankruptcy against him, the Lord Keeper Ordered that a Commission should Issue, unless Cause were this Day shown to the Contrary. And it was now Moved that the granting of the Commission might for some time be Suspended, for that much the Major Part of the *Alderman's* Creditors had Compounded with him, which would be all set aside and avoided, if a Commission should go; and it was sought for only by some few and Unreasonable People; the *Alderman* having already made very fair Proposals, *viz.* that the Creditors should be paid their whole Debts, One *fifth* in ready Mony, and the other four *fifths* in Assignments on the *Exchequer*; and that near two hundred and fifty of his Creditors had accepted of this Composition, and actually received their Moneys, which now would be all over-reached by this Commission: and they did not doubt, but in a Month's time, if the Commission might be so long Suspended, they should agree with the rest of the Creditors.

But by the Council for the *Creditors* it was answered, that by the *Alderman's* petitioning for Time and other studied Delays, and by reason of Privilege coming in, he had already for near seven Years prevented the Creditors of the Benefit of this Commission already; and that their Danger was very great in these Delays; for by the Statute a Purchaser was not to be over-reached unless the Commission was Sued out within five Years after his Purchase, and they did not know but that this might be a critical time for the granting of the Commission in that respect: And by the very Words of the Statute no Commission of Bankruptcy can issue after a Man's Death; and tho' it was granted in a Man's Life-time, yet if nothing was done upon it before he dies, all is avoided.

Lord Keeper declared, that tho' the Words in the Act of Parliament were, that the *Chancellor* may grant a Commission of Bankrupt, yet that (*may*) was in Effect (*must*), and it had been so resolved by all the Judges. And the granting of a Commission was not a Matter discretionary in him, but that he was bound to do it: And that he had done the *Alderman* already what Kindness he could, in that he refused to grant a private Seal for the passing of this Commission; but that now he could deny it no longer, by reason of the Prejudice and Hazard that the Creditors might in this Case sustain by Delays. And as for what was said, that much the greater part of the Creditors had already submitted to a Composition, and had delivered up their Specialties, and now this Commission would over-reach them, and they would be in danger to lose their Debts; he said, he could not help that, if it should so fall out: But as for Bills of Conformity they had been long since exploded, and there was no such Equity now in this Court: But he would take care, that there should be able Persons nominated Commissioners; and therefore first, to prevent all Danger, he directed the Commission should be this Day Sealed, and that the Commissioners should meet, and proceed to prove the *Alderman* a Bankrupt, so that the

Execution of the Commission might not be prevented by his Death; and that then they should surcease all further Prosecution: And directed Alderman *Backwell's* Council to bring him the Names of such sufficient and honest Persons, as might be fit to be Commissioners in this Case, and such as might treat with the Creditors, and see if they could come to any Agreement; and he would renew the Commission to such Persons: And said, it was a Mischief, that the Act of Parliament had subjected the Commissioners to an Action, so that no sufficient Persons, and such as might be fit to manage such a Concern as this, would undertake the trouble of it. And as for a Debt of 60000*l.* that Mr. *Attorney* said the *Alderman* owed the *King*, the *Lord Keeper* said, if such a Debt was owing, it was fit Application should be made to the *Lords* of the *Treasury*, that his *Majesty* should be satisfied out of the Assignments of the Exchequer Debt; but said, there was a Patent now lay before him, which he was much importuned to pass, whereby this Debt of the *King's* was to be fixt upon the Land, and the *King* to grant this to the *Alderman's* Son.

Vid. post Case
205.

Case 143.

Eodem die.

In Court

Lord Keeper.

Vid. ante Case
102.

Anonimus.

UPON a Motion for a Messenger upon a *Cepi Corpus* returned in *London*: The *Lord Keeper* said, that now the granting of a Messenger in such a Case was become the ordinary Process of the Court, and it might be necessary for Expedition; but he must take Care that the *King* might not lose his Amerceaments, and therefore for the future no Messenger should go till the Sheriff was amerced: But it was answered, that would occasion great Delay, for that the Sheriff could not be amerced, but in Term time.

Anonimus.

Anonimus.

Case 144.

Eodem die.

In Court
Lord Keeper.

A Motion was made that a Man, who was found to be a Lunatick, being now by his Confinement become of sound Mind, might be inspected, and might make a Settlement of his Estate. But the *Lord Keeper* refused to make any Order in it; but directed them, that if he made any Settlement of his Estate, the same should be done before the *Justice of the Common Pleas* by Fine, that so they might examine him, and inspect him. And directed, that for as much as now he was found a Lunatick on Record, they should reply to it, that he was now restored to his Understanding; that so Issue might be taken upon it and try'd in the *Common Pleas*.

Motion, that a Lunatick, who had recovered his Understanding, might be inspected and make a Settlement of his Estate.

The Case of the Town of Nottingham.

Case 145.

27 Aprilis.

In Court
Lord Keeper.

THE Corporation being divided into Parties, one Party surrendred the old Charter, and took a new one; the other Party would stand and fall by their old Charter, and brought a *Scire fac.* to repeal this new Charter, upon which the old Sheriffs returned *Scire feci*, and the Return was filed.

Scire facias to repeal a new Charter, after Surrender of the old one, returned by the old Sheriffs. If it shall be received.

And now it was moved by Mr. *Attorney General*, that this Return might not be received, for that were to admit that the old Charter was in being, contrary to the Surrender and new Charter, which were both remaining on Record in this Court.

But it was answered, that the Objection of Prejudice was equal on both Sides; but with this, that it was impossible this Retorne should be made by the new Sheriffs, for they are Defendants, and they cannot retorne, they had served themselves: And Mr. *Attorney* has admitted, that

that the old Sheriffs are the Sheriffs in Possession, by his bringing a *Quo Warranto* against them: And this being purely a Question of Right, and the Retorne that is to be made being only whether they had Notice or not; they cannot be injured by it: If they have not legal Notice they may plead it, and it will that way avail them. And now they move too late, this Retorne being already regularly fil'd in Court, and to damn it now, were to determine the Merits of the Cause upon this Motion.

The *Lord Keeper* was of Opinion, that the Court in such a Case as this ought not to interpose; but gave Mr. *Attorney General* a Fortnight's time to speak to it; but said, whereas the King has a *Quo Warranto* depending against them, if the Parties, who were against the new Charter, meant to out-run the King's Action, he thought that ought not to be suffered; and it was a strange Proceeding and without Precedent, that was used in the Duke of *Buckingham's* Case, viz. pending the King's Suit to convict his Witnesses of Conspiracy.

Case 146.

Eodem die,

In Court.

The Lady *Poines's* Case.

No Injunction to quiet Possession, but where the Party has been in Possession three Years before filing his Bill, or where the Cause has been heard, and the Merits determined.

THE Lady *Poines's* Trustee having Contracted to sell her Estate to one Person, and she herself having actually sold it to another, this Trustee disturbed the Purchaser in his Possession; and it was now moved for an Injunction to quiet the Possession of the Purchaser. But it was answered, that such a Motion never was made to have an Injunction to quiet the Possession for a Defendant, who had no Bill in Court, and that before the Cause was heard. An Injunction for quieting the Possession is only grantable where the Plaintiff has been in Possession for the Space of *three* Years before the Bill exhibited, upon a Title yet undetermined, or in Case the Cause hath been heard, and Judgment passed upon the Merits of the Cause by the Court. And therefore the *Lord Keeper* denied the Motion.

Browne

Brown versus Brown.

Case 147.

30 Aprilis.

In Court

Lord Keeper.

2 Ch. Rep.

140.

SIR *Anthony Brown* being Tenant for Life, Remainder to his first and other Sons in Tail, Remainder in Tail to the Defendant of some Mills and Houses of about 70 *l.* *per Ann.* and having no Issue, suffered the Mills and Houses to go greatly out of Repair; and it was computed that the Reparations would amount unto 380 *l.* or thereabouts; hereupon *Brown*, the Remainder Man, brings an Action of Waste at Law. When the Cause came to be tryed at the *Affizes*, there was a Proposition made for a Reference to Arbitrators and Umpire, and accepted by the Parties, and by Consent it was made a Rule of Court. Afterwards and before the Award made, Sir *Anthony Brown* repairs all the Waste within forty Shillings, and forbids the Arbitrators to make any Award, who thereupon forbore, and likewise forbid the Umpire; but he, notwithstanding, made his Award, that Sir *Anthony Brown* should pay the Defendant 380 *l.*

Award made in pursuance of a Rule of Court, at a Tryal in an Action of Waste, against Tenant for Life for not repairing, and 380 *l.* awarded, and tho' the Party had made good the Repairs within 40 *s.* before the Award made, yet no Relief.

The Plaintiff's Bill was to be relieved against this Award; and for the Plaintiff it was insisted, that it was a bold thing of an Arbitrator or Umpire to make an Award, after he had been forbid by the Party; and they said it was a Rule here, that no Award should stand, where the Arbitrator or Umpire refused to hear the Party; and they endeavour'd to make it out, that the Umpire had so done in this Case; but their Proof amounted to no more, than that the Umpire had said, he was so well satisfied, as to the Value of the Repairs, that the Plaintiff might bring what Witnesses he would, he should not believe them, he having viewed the Repairs himself. Then they insisted that the Damages in this Case were very outrageous, the Repairs being made good within 40 *s.* before the Award made: And the Umpire being a Carpenter, they compared it to the Butcher of *Craydon's* Case, who had awarded a

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Man,

Man, that had been called a *Bankrupt Knave*, 300 *l.* to repair his Honour, as he expressed it in his Award. And it was said that in this Case the Defendant had but a remote Remainder after an Estate Tail, and yet he had as much Damages given him, as if he were to come immediately into the Estate.

For the Defendant it was insisted, that this was an Award made in Pursuance of a Rule of Court, and the whole Matter had been examined in the *Common Pleas*, and when they were at the Wall there, and under an Attachment for not performing of the Award, then they come with a Bill here, and get an Injunction; whereas it is not usual to stay Proceedings on an Attachment in another Court: And that here was no Fraud or Collusion in the making of this Award, and *that* is necessary to the avoiding of it in Equity. And they conceived the Damages were not outrageous, for the Umpire might have given the treble Value. And as to the Objection, that the Defendant had only a remote Remainder after an Estate Tail, it was answered by Serjeant *Maynard*, that the Damages were not to be considered in Proportion to the Man's Estate, who is to have them, but proportionable to the Damage done the Inheritance: And he said if Awards must be set aside on such slight Pretences, they had as good strike that Title out of the Books; and he cited the Case of *Robins* and *Grantham*, where there was a plain Mistake of 250 *l.* and yet the Party could not get any Relief against the Award. And the Case of *Crab* and *Fenton*.

After long Debate the *Lord Keeper* dismissed the Bill, saying, he saw no Fraud or Collusion in the Matter, and the Damages were not outrageous: he might have awarded the treble Value, altho' it's true, as was Objected by the Plaintiff's Council, 380 *l.* is near the Value of an Estate for Life of 70 *l.* *per Ann.* He said, where there appears a manifest Error in the Body of an Award, there in some Cases there may be Relief against it in *Chancery*; but where

the Error does not appear without unravelling of it, and examination to matters of Account, he thought it was not relieveable here.

Note, In this Case the Umpire himself, tho' excepted to, was read as a Witness.

Hollis versus Edwards, & al'.

Case 148.

Deane versus Izard.

1 Maij.

In Court.
Lord Keeper.

IN these Cases, Bills were exhibited to have an Execution of Parol Agreements touching Leases of Houses, and set forth, that in Confidence of these Agreements the Plaintiffs had expended great Sums of Money in and about the Premises, and had laid the Agreement to be, that it was agreed, the Agreements should be reduced into Writing. The Defendants pleaded the Statute of *Frauds* and *Perjuries*.

Vid. ante Case
141.

For the Plaintiffs it was insisted on the Saving in the Act of Parliament, *viz.* Unless the Agreement were to be perform'd within the space of a Year: But it was answered, *that* Clause did not extend to any Agreement concerning Lands or Tenements. Then it was insisted for the Plaintiffs, that undoubtedly they had a clear Equity to be restored to the Consideration they had paid, and to the Money which they in Confidence of the Agreement had expended on the Premises.

As touching that Matter, it was said by the *Lord Keeper*, that there was a Difference to be taken, where the Money was laid out for necessary Repairs or lasting Improvements, and where it was laid out for Fancy or Humour; and that he thought clearly the Bill would hold so far, as to be restored

stored to the Consideration: But he said, the Difficulty that arose upon the Act of Parliament in this Case was, that the Act makes void the Estate, but does not say the Agreement it self shall be void; and therefore, tho' the Estate it self is void, yet possibly the Agreement may subsist; so that a Man may recover Damages at Law for the non-Performance of it; and if so, he should not doubt to decree it in Equity: And therefore directed, that the Plaintiffs should declare at Law upon the Agreement, and the Defendants were to admit it, so as to bring that Point for Judgment at Law; and then he would consider, what was further to be done in this Case.

Case 149.

Lady Dacres versus Chute.

Eodem die.

In Court

Lord Keeper.

2 Ch. Rep. 104.

Sequestrators having by virtue of an Order Power to fell Timber, they fell Timber to the Value of 7000*l.* and pay over but 2000*l.* to the Plaintiff for whose benefit the Sequestration was taken out.

Plaintiff not chargeable with more than the 2000*l.*

THE Lady Dacres by Agreement made on her Marriage with the Defendant's Grandfather was to have a Jointure of 500*l.* per Ann. or 5000*l.* in Mony. She elected the 5000*l.* in Mony, and had a Decree for it, and a Sequestration of the Defendant's Lands, and a Writ of Assistance to put her in possession, and a Decree was made against the Defendant, then an Infant, for Maintenance to be allowed his younger Brothers and Sisters; and this was to be paid out of the sequestered Estate.

Upon an Appeal the *House of Lords* reverse this Decree as to the Maintenance, which had been paid to the Lady Dacres, and which she had applied for the Maintenance of the Children: and now the Cause came back to the Court to have the Account taken of what the Lady, her Agents, or any under her, had received out of this Estate. The Lord Keeper upon the Account allowed the principal Sums paid for Maintenance towards the sinking of the Lady Dacres's Debt, but would not let them be applied at the time they were paid; but in one intire Sum at the end of the Account; and so struck off all the Interest for above sixteen Years, which came to more than the

Prin-

Principal; saying, that this was a hard Case, and Damages were in the Power of the Court.

In this Case the Sequestrators had Power by Order of the Court to fall Timber; and it appeared by Proof in the Cause, that the real Value of the Timber taken by them off this Estate amounted unto 7000*l.* and but 2000*l.* had been brought to Account. And for as much as it did not appear that the Lady *Dacres* had received more then 2000*l.* on account of the Timber, the *Lord Keeper* would not charge her further, saying, the Sequestrators were the Officers and Agents of the Court, and Men must take care to pay their Debts at their Peril: tho' the Defendant was all this time an Infant.

Twisden versus Wife.

Case 150.

4 Maij.

In Court

Lord Keeper.

MOneys were left in Trustees Hands for the Benefit of a Feme Covert, and the Husband dyes. The Question was, whether the Wife or the Executor of the Husband should have it; and decreed for the Wife, the Husband having made no particular disposition of it.

Money in Trustees Hands for a Feme Covert, shall go to the Feme, if she survives the Baron, and not to his Executors.

Alam versus Jourdan.

Case 151.

THERE being but one Witness against the Defendant's Answer, the Plaintiff could have no Decree.

Company of Pewterers versus Governour of Case 152.
Christ's Hospital.

Eodem die.

A Man devises Land to one and the Heirs of his Body, but if he should go about to alien, that then his Estate should cease, and from and after the Determination

A Devise to a Man and the Heirs of his Body, and if he shall go about to alien, his Estate shall

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cease, and the Lands go over to a Charity. The Devise over is void, it tending to create a Perpetuity.

of his Estate, then he Devised the Lands to *Christ's Hospital*.

The Question was, if the Limitation to *Christ's Hospital* was good.

It was admitted, that this Restraint of Alienation tended to a Perpetuity, and was therefore void; but the Fact being, that the Estate tail was spent by Effluetion, and the Donee being now dead without Issue, the Charity ought to take place, and the Limitation was good.

But the *Lord Keeper* decreed against the Charity, and said that this was an Invention taken up about the time, that this Will was made, to create a Perpetuity; thinking that by limiting an Estate over to a Charity, the Law would be so careful to preserve the Charity, that it would allow of such a Limitation, and admit, that Advantage might be taken of a Forfeiture in the Case of a Charity, which it would not do in the Case of a private Person: And the Intention of the Testators plainly appearing to be to create a Perpetuity, the Limitation was adjudged void.

Case 153.

Anonimus.

Legatees paid before Creditors where the Assets tell short, decreed to refund to an unsatisfied Creditor.

A Being indebted unto *B*, makes *C* his Executor. *C* wastes the Estate, and dies, and makes *D* his Executor, and by his Will Devises several Legacies. *D* pays the Legacies. *B* exhibits a Bill against *D*, the Executor of *C*, for his Debt due from the first Testator, and against the Legatees in the Will of *C*, to compel them to refund their Legacies, there not being now sufficient Assets of the first Testator.

Decreed that the Legatees should refund.

Duke

Duke of Norfolk versus Howard.

Case 154.

15 Maj.

In Court
Lord Keeper.

THE Matter now coming on to be argued on a Bill of Review to reverse the Decree made in this Cause by the late *Lord Chancellor*, Errors assigned upon a Demurrer were, *First*, that it does not appear there was an Attornment to him that made the Settlement. *Secondly*, That the now Plaintiff ought not to be accountable for the Profits longer than he received the same. *Thirdly*, That at the pronouncing of the said Decree the *Chancellor* was assisted with *three Judges*, who were of Opinion against the Decree. *Fourthly*, That the Limitation of the Term over unto the Defendant *Charles Howard* was void. But the only Error insisted on was the fourth, *viz.* that the Limitation of the Term over was void.

The *Lord Keeper* said, that at the time of the pronouncing the former Decree, his Opinion was against the Decree, and that he had considered of it since, and could not find any Reason to alter his Opinion; and therefore told them plainly, that this Cause came before him with some Prejudice, unless they could by new Matter or new Reasons convince him; and therefore did propose, that the Plaintiff should admit the Trust of the Term to be an Estate at Law executed to the same Uses, and that they should try their Title in an Ejectment at Law; but the Defendant's Council declined it, and insisted their Case was much stronger in Equity than it was at Law; and they relied much upon the Trust of a Term to be different from the Limitation of a Term at Law.

The Plaintiff's Council argued much to the same Effect as formerly, and relied upon the Case of *Child and Bailey*,^{2 Gr. 459.} and *Burges and Burges*.^{Pol. 40.}

The

Trust of a Term governed by the same Rules in Equity, as the Limitation of the legal Estate of a Term is at Law.

Perpetuities odious.
Vid. ante Case 152.

The Lord *Keeper* declared he saw no reason to change his former Opinion. He said the late Lord Chancellor declared upon the hearing of this Cause, that the Trust of a Term was to be governed by the same Rules, as the Limitation or Devise of a Term at Law was, and therefore thought he was unreasonably pressed by the Defendant's Council, who insisted on the Equity of the Case, and would make a difference between the Limitation of the Trust of a Term, and a Devise of a Term or Limitation of a Term it self. A Perpetuity is a thing odious in Law, and destructive to the Commonwealth: it would put a Stop to Commerce, and prevent the Circulation of the Riches of the Kingdom; and therefore is not to be countenanced in Equity. If in Equity you should come nearer to a Perpetuity, than the Rules of common Law would admit, all Men, being desirous to continue their Estates in their Families, would settle their Estates by way of Trust; which might indeed make well for the Jurisdiction of the Court, but would be destructive to the Commonwealth. And the Intention of a Man is not always to be pursued in Equity: as in the Case put by Mr. Serjeant *Maynard*. If a Man settles a Term in Trust for one and his Heirs, it shall go to the Executor. And he remembered, at the last hearing, it was said that my Lord *Bridgeman* directed this Conveyance, and his Name was urged to give an Authority to the Case: But he said, this Conveyance, whoever drew it, was certainly a very inartificial Conveyance; for *First*, If the words, Heirs males, had been left out, it would have been good. *Secondly*, If there had been a new Term created, it would have been good. *Thirdly*, As this Term is limited, if the Honour of *Graistock* had not descended to the present *Duke* himself, but to his Issue, then this Provision for the Defendant had been out of doors. *Fourthly*, The Limitation to all the several Sons in Tail, the one after the other, was certainly inartificial; and said it was an hard Case: But the Rules of Law must be observed: and ordered the former Decree to be reversed.

Note, This Decree was reversed in the House of Lords the 19 June 1685, and the former Decree of the Lord *Nottingham* assumed.

Treackle and Coke.

Case 155.

Eodem die.

Lord Keeper.

THE Assignee of a Lease rendring Rent, having enjoyed the Land Six Years, assigns over. The Bill was to call him to an accompt for the Rent for such time as he enjoyed the Land; the Defendant pleaded a Judgment upon a Demurrer at Law; and the Plea was over-ruled: for tho' in strictness of Law there is no Privy of Contract to charge the Assignee, yet in Equity he is most certainly chargeable for such time, as he received the Profits.

Assignee of a Lease rendring Rent assigns over, he shall be liable in Equity for the Rent during the time he enjoyed the Land.

The Council alledged, there were Twenty Precedents in the Case; and the *Lord Keeper* said, if there had not been one, he should not have doubted to have made a Precedent in this Case.

Ashton versus Ashton.

Case 156.

Eodem die.

A Bill being exhibited to prove a Will, and perpetuate the Testimony of the Witnesses, the Defendant upon Cross Examination of one of the Witnesses exhibited an Interrogatory to him, to discover what Deeds or Settlements he knew the Testator had made; To which the Witness demurred, as not pertinent to the Matter in Issue.

A Witness cannot demur, because the Questions asked him are not pertinent to the Matter in Issue.

The *Lord Keeper* over-ruled the Demurrer, because he would not introduce such a Precedent, as for a Witness to demur: it did not concern the Witness to examine what was the Point in Issue.

Case 157. *University Colledge in Oxon versus Foxcroft.**Eodem die.*

If a Sequestration for a Personal Duty may be revived against the Heir.

UPON a Demurrer the Lord *Keeper* inclined, that a Sequestration for a Personal Duty determined with the Death of the Party, and could not be revived against the Heir; but took time to consider of it, and would be attended with Precedents; and the Case of *Rockley* and *Burdett* was cited, where it was ruled, that such a Sequestration should not bind the Feme, who came in for her Jointure or Dower.

Vid. ante Case 106.

Case 158.

*Mellish versus Williams.**Eodem die.**Ante Case 103.*

Upon a Bill of Review the Party cannot assign for Error, that any of the Matters decreed are contrary to the Proofs in the Cause.

WILLIAMS in his Bill of Review assigned for Error the subject Matter of fourteen Exceptions to the Master's Report, which had been formerly over-ruled; and the Defendant demurred, for that there was no Error appearing in the body of the Decree.

But must shew some Error appearing in the Body of the Decree, or new Matter discovered since the Decree.

The Plaintiff's Council insisted, that these matters being contrary to the Proofs in the Cause, tho' they were matters of fact, they might be examined in a Bill of Review upon the Proofs already taken; for the Rule of the Court is, that there must be Error appearing in the body of the Decree without further examination of matters of Fact; which implies, that if it can be done without farther Proof, a Decree may be reversed for Errors which may be made out by Proofs already taken in the Cause: But that was utterly denied by the Defendant's Council and the Court: for that only Errors in Law could be assigned; or new Matter discovered since the Decree made, and that with leave of the Court.

Popham

Popham versus Bamfeild.

Cafe 159.

18 Maij.

In Court
Lord Keeper.

Ante Cafe 73.

THIS Cause came on to be reheard; but the *Lord Keeper* did not vary the former Decree. He said, the Difference was, whether this Case lay in Compensation or not: For where there can be a Recompence made, this Court will relieve against such a Condition: And therefore directed a Master to look into it, and see what Recompence Mr. *Popham* had made his Son by his Will: And declared, if a Compensation was made, he would relieve against the Breach of the Condition: But in case a sufficient Compensation was not made, he would then consider farther of it.

Vermuden versus Read.

Cafe 160.

Eodem die.

In Court
Lord Keeper.

Ante Cafe 64.

THIS Case being likewise reheard, the *Lord Keeper* thought not fit to aid the Complainant, or to make a better Case for him in Equity than he had at Law upon the Articles; but thus far only, that whereas Sir *Compton Read* by the Articles had a Power to retain the 4000*l.* at 3*l. per Cent.* Interest, his Lordship decreed, that Sir *Compton* should either pay the Mony, or that the Complainant should hold the Land absolutely for his Life.

Nott versus Hill.

Cafe 161.

Eodem die.

In Court
Lord Keeper.

2 Ch. Rep. 120.

THE Plaintiff being intituled to an Estate Tail, after the Death of Sir *Thomas Nott* his Father, in a House at *Richmond in Surry*, which, if in Possession, was worth to be sold about 800*l.*; and being cast off by his Father, and destitute of all means of Livelihood, did in 1671 for 30*l.* paid him in Money, and 20*l. per Ann.* secured to be paid him during the joint Lives of him and his Father,

ab- Purchasor

would have
lost all his Mo-
ney.

Ante Case 134.

Vid. post Case
168.

Note, This Decree not being Signed and Enrolled, the Cause was reheard before the Lord Chancellor Jefferys, 27 May 1687, who reversed the Lord Guildford's Decree, and confirmed the Decree made by the Lord Nottingham, declaring, he took Hill's Purchase to be an unrighteous Bargain in the beginning; and that nothing which happened afterwards could help it.

absolutely convey his Remainder in Tail to the Defendant *Hill's* Father and his Heirs.

The Plaintiff's Father lived 10 Years after this Conveyance; and after his Father's death, Plaintiff brought his Bill to be relieved against this Conveyance, charging, that it was intended to be only as a Security; and tho' there was no Proof to that purpose, and the Deed was absolute; and tho' *Hill* had lost all his Money, if the Plaintiff had died in his Father's Life-time, yet upon the first hearing of this Cause, 20 June, 34 Car. 2. the Lord Nottingham decreed a Redemption.

And this Cause being now reheard before the Lord Keeper, he reversed the Lord Nottingham's Decree, and declared, he did not see how he could relieve the Plaintiff: If it be to be declared a Law in Chancery, that no Man must deal with an Heir in his Father's Life-time, that were something; but as it now stood, he saw no Reason to relieve the Plaintiff; but dismissed the Bill.

Case 162.

Earl of Macclesfeild versus Fitton.

19 Maij.

In Court
Lord Keeper.

Mortgagee assigns his Mortgage to *J. S.* who pays off the Principal and the Interest which is considerably in Arrear. Whether this Interest shall be reckoned Principal against the Mortgagor.

THE Bill was to have the Redemption of a Mortgage of the Manor of *Bosley* and *Siddington* in the County of *Chester*, that was formerly the Estate of Sir *Edward Fitton*, which Mortgage had been Assigned to the Defendant *Fitton*. The Bill was exhibited so long since as Feb. 1662. But being then put off for want of proper Parties, the Plaintiff claiming the Estate by the Will of Sir *Edward Fitton*, and had not brought the Coheirs to a hearing, and so the Cause slept till now, the Lord *Macclesfeild* being all the while in Possession.

The Points now insisted on, were two.

First,

First, Upon the Assignment to the Defendant *Fitton*; the Debt was stated betwixt him and the Mortgagee, and some of the Coheirs, that were then look'd upon to have a Right to the Redemption: And the Defendant's Council insisted, that this ought to conclude the Plaintiff, as a stated Accompt: But the Plaintiff being no Party thereunto, *that* was over-ruled by the Court.

Secondly, There being great Arrears of Interest due at the time of the Assignment, which were paid by Mr. *Fitton*, the original Mortgage-money being but 1500 *l.* and he paid upon the Assignment 2300 *l.* The Question was, whether the 800 *l.* paid for Interest then in Arrear should be reckoned Principal, as to the Defendant *Fitton*, and carry Interest with it.

For the Plaintiff it was insisted, Interest was never made Principal in such a Case, unless the Mortgagor had joined in the Assignment; and they cited the Case of *Porter and Hubbard*, where in a like Case it was decreed, that Interest should be reckoned Principal; but for that Reason the Decree was reversed in the *House of Lords*.

But the *Lord Keeper* said, that Precedent would not weigh much with him: he was of Council in the Case, and it was hard in all its Circumstances; for there the Mortgage being in the late times, altho' the Mortgagor received all the Profits without Interruption, when things were dearer than ordinary, by reason of the Troubles in other parts of the Kingdom, yet in that Case the *Lords* would not allow of 6 *l. per Cent.* Interest, but reduced the Interest to 4 *l. per Cent.* But altho' he thought it reasonable that the Interest paid upon the Assignment should be reckoned Principal; yet he would not now make a New Precedent; But directed the Defendant's Council to search for Precedents, and if they could find any One, he would follow it in this Case; But the Plaintiff's Council affirmed, there was no such

Vid. 1 Ch. Repi
67.

Case 163.

21 Maij.

In Court.

Lord Keeper.

This Court will not order a Writ of Error in a Criminal Case to be seal'd, till 'tis first signed and allowed by the Attorney General.

Writ of Error in a Criminal matter not due *ex Debito Justicie*.

Post Case 168.

Crawle versus Crawle.

A Man being indicted for not coming to Church, and found Guilty, Application was made to Mr. Attorney General, that they might bring a Writ of Error, but he refused to allow thereof; And thereupon Mr. Wallop this day moved the Lord Keeper for a Writ of Error: But the Lord Keeper told him, that tho' he had the Custody of the Great Seal, yet he could make no Use thereof, but according to the Course of the Court; and therefore could not put the Seal to a Writ of Error till it had been first signed and allowed by Mr. Attorney: And he took it, that a Writ of Error in a Criminal Matter was *ex gratia Regis* in all Cases, but where Provision is made for the same by the Statute, and is not due *ex Debito Justicie* or *de Cursu*, as Mr. Wallop would have it: But if there were real Error in the Case, and a Writ of Error was not sought for delay, their way was to petition the King, and he would give directions for inspecting the Proceedings, to see if there was real Error, or whether a Writ of Error was sought purely for Delay: And Mr. Attorney said, that *Crawley* being indicted upon the *Stat' 3 Jac'*, no Error could avail him; and the Indictment could not be quashed, nor the Proceedings avoided, otherwise than by Conformity.

Case 164.

26 Maij.

In Court.

Lord Keeper.

Feme Mortgagee in Fee of a Copyhold marries, and dies, living the Husband. Whether the Husband, as Administrator to the Wife, or the Heir shall

Turner versus Crane.

A Feme Sole having a Mortgage in Fee of a Copyhold marries; and dies leaving Issue, which Issue is admitted and dies, and then the Husband as Administrator to his Wife claims Title to this Copyhold, as being a Mortgage, and so part of his Wife's Personal Estate.

The Question being now between the Husband and the Heir at Law; the Lord Keeper declared, he would be

attended with Precedents; but said, he did not much regard what had been objected, that the Issue of the Feme had been admitted by the Husband. But all he scrupled was, that in this Case there was no Covenant for the Payment of the Mortgage-mony, which alone gives the Executor Title to the Mortgage-mony: And altho' it was urged, that there could be no such Covenant in the Surrender of a Copyhold, and that it would be unreasonable and inconvenient to have one Law, as to Freehold Mortgages, and another as to Copyhold; yet he would make no Decree in it, till he should be attended with Precedents.

have the Benefit of the Mortgage, there being no Covenant to pay the Mony.

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Term. S. Trinitatis,

35 Car' II. 1683.

IN CURIA CANCELLARIÆ.

Case 165.

Anonimus.

Lord Keeper. If a Cause has slept twelve Months in Court; there shall be no Proceedings had upon it, without first serving a *Subpœna ad faciendum Attornat'*.

Case 166.

Anonimus.

WHERE a Man is Arrested upon an Attachment, the Contempt shall hold good, tho' no Affidavit be filed at the time of taking forth the Attachment, if it be filed before the Return of it.

Case 167.

Creed versus Covile.

15 Junij.

*In Court
Lord Keeper.*Whether the
Trust of an
Estate in Fee
descended upon

THE single Point of this Case was, whether the Trust of an Estate in Fee descended upon the Heir is liable in Equity to the Satisfaction of a Debt by Bond, wherein the Heir is expressly bound?

The late *Lord Chancellor* had decreed it Assets; but upon a Rehearing before the *Lord Keeper*, he seemed doubtful.

the Heir, is liable in Equity to the Satisfaction of a Debt by Bond, wherein the Heir is bound.

For the Heir against the Decree it was said, that this Point had formerly been settled upon great Advice in the Case of *Box* and *Bennet*, which was heard by the *Lord Chancellor*, with the Assistance of the *Lord Chief Justice Hales*, and Mr. *Justice Wadham Windham*. And that this Decree was unreasonable, in that an Accompt of the Profits was decreed during the Infancy; whereas at Law if the Heir is bound in the Bond of the Ancestor, and after the Death of his Ancestor is sued during his Infancy, the *Parol* must demurr, and the Plaintiff can't have Judgment against the Infant, neither are the Profits liable, during his Minority.

But for the Decree it was argued, that the Precedent of *Box* and *Bennet* was look'd upon as a hard Case, and had never carried any great Authority with it; it being a Precedent of the *Judges* making, who look upon the Court of *Chancery* as precarious in its Jurisdiction, and therefore, as much as may be, are for restraining it to the Rules of Law: But a Trust, being a Creature of this Court, ought to be governed solely by the Rules of Equity, and Equity ought to be conformable throughout; and therefore why should not the Trust of an Inheritance be Assets, as well as the Trust of a Term? An Equity of Redemption is every Day made Assets in Equity; and what Reason can be given, why in Equity a Trust of an Inheritance should not be Assets, where the Inheritance it self, had it not been in Trust, would have been Assets at Law?

As to the Profits during Minority, they said, that was not insisted on by them, tho' they had no Precedent in Equity, that the *Parol* should Demurr; but Infants were there Suable.

Whether the Parol shall demur in Equity, in Case of a Descent of a Trust to an Infant.

Lord Keeper. I know the Case of *Box* and *Bennet* has had hard Words given it, and been much railed at; but the Decree in that Cause was made upon great Advice, and he did not know, how he could be better advised now; and said, there was a difference between the Case of an Heir, and the Case of an Executor; and therefore the Trust of a Term and the Trust of an Inheritance are not the same thing, as to this Point: For whatever Money comes to the Hands of the Executor, either by Sale of the Term, or if Money be decreed to him in this Court, will be Assets: But if an Heir, before an Action brought, sells and aliens the Assets, the Money is not at Law liable in his Hands; unless the Sale were with Fraud or Collusion; as if an Heir sell and buy again, there the new purchased Lands will be Assets. And as to an Equity of Redemption, he said, that if a Man had a Mortgage and a Bond; before the Mortgage should be redeemed by the Heir the Bond ought to be satisfied; but he did not know, that an Equity of Redemption should be Assets in Equity to all Creditors: And mentioned Mr. *Baron Weston's* Case against Mrs. *Danby*, which was thus.

Baron Weston had a Debt due to him by Bond, wherein the Heir was bound, but it happened that for three Descents the Heir was still an Infant, and so the *Parol* demurred at Law, till the Interest much exceeded the Penalty of the Bond: And Mrs. *Danby* having been all along Guardian to these Infants, and received the Profits of the Estate without paying any Debts, and converted them to her own use, the *Baron* therefore brought an Action against her, and called her Administrator to these Children; but the *Baron's* Policy did not prevail.

As to the Case in Question, his Lordship said, he would not throw such a Cause out of Court without good Consideration first had, and that he should be much governed by the Precedent of *Box* and *Bennet*, unless they could shew, that the latter Precedents had been otherwise; and
directed

directed them to attend him with Precedents towards the latter end of the Term.

The Rioters Case.

Case 168.

Eodem die.

In Court.

Lord Keeper.

THIS Day a Motion was made, That the Lord Keeper would grant a *Mandatory Writ* to the *Chief Justice* of the *King's Bench* to command him to sign a Bill of Exceptions in the Case of the *Lord Gray & al'*, who were convicted for a Riot in *London*; and they produced a Precedent, where in a like Case such a Writ had issued out of *Chancery* to the Judge of the Sheriff's Court in *London*.

A Motion for a *Mandatory Writ* to the Chief Justice of the *King's Bench* to sign a Bill of Exceptions, denied, tho' such Writ has issued out of *Chancery* to a Judge of an inferior Court.

But the Lord Keeper denied the Motion: For that the Precedent they produced was to an Inferior Court, and he would not presume, but the *Chief Justice* of *England* would do what should be just in the Case; for possibly you may tender a Bill of Exceptions that has false Allegations in it, and the like; and then he is not bound to sign it; for that might be to draw him into a Snare: and said, if they had wrong done them, they might right themselves by an Action of the Case: And if this Court had a Power to grant such a Writ, the same was discretionary only, as Writs of Error are in Criminal Cases, which are discretionary and not *de cursu*: And said he had a Collection of several Cases out of the old Books of the Law, that were given unto him by my Lord Chief Justice Hales, which shew that Writs of Error in Criminal Cases are not grantable *ex debito Justitiæ*, but *ex gratia Regis*: And in such a Case a Man ought to make Application to the *King*, and he will then refer it to his Council, and if they certify there is Error, the *King* will not deny a Writ of Error.

Ante Case 163.

Bar-

Barbone versus Brent.

Case 169.

19 Junij.

*In Court**Lord Keeper.*

Money paid in
Part. Receipts
lost. The
whole recovered
at Law.

No discovery
after a Verdict.

THE Bill was to have an Account, setting forth, that the Plaintiff had bought several Goods of the Defendant, and had paid him several Sums of Money in Part of Satisfaction, but the Plaintiff having lost the Receipts and Acquittances, the Defendant had recovered the whole Value of the Goods at Law.

The Defendant Demurred to this Bill, because it appeared of the Plaintiff's own shewing, that the Defendant had recovered at Law.

For the Plaintiff it was insisted, that if this Case upon the Bill was true, which by the Demurrer is admitted so to be, the Plaintiff ought to be relieved in Equity, as to the Money overpaid.

Lord Keeper. If a Man pays Money in Part of Satisfaction, and afterwards the whole Value of the Goods is recovered against him at Law, the Money so paid upon that Account becomes Money received for the Use of him that paid it, and he may recover it in an Action at Law.

But it was answered by the Plaintiff's Council, that tho' that may be true, where the whole Debt is recovered, yet it would not be so in this Case, because here the Jury had allowed some Payments and made some Abatement of the full Value, but had not allowed all the Payments; because the now Plaintiff could not produce his Receipts: And now if they should bring an Action at Law for the Money so overpaid, they could not make out what Payments the Jury allowed and what not. *Sed non allocatur.*

It was then insisted by the Plaintiff's Council, that they were intitled to have a Discovery in this Court in order to enable them to proceed at Law, they having lost their Receipts and Acquittances.

Lord Keeper. After a Verdict at Law you come too late for that, and I see no reason why the Defendant should be put to answer. Allow the Demurrer.

Portington versus Tarbock

Cafe 170.

Eodem die.

In Court.

Lord Keeper.

THE Bill was a Bill of *Review* and *Appeal* to set aside a Decree in the Court of *Exchequer* in the *County Palatin* of *Chester* made in a Cause wherein the now Defendant was Plaintiff, and the now Plaintiff was Defendant; and it was charged in the present Bill, that there was no sufficient Ground for making the said Decree.

Whether an Appeal will lie to this Court from a Decree in a Court of Equity in a *County Palatin*.

The Defendant put in a Plea, and set forth that the Parties to the said Decree were, and long had been, Inhabitants in the said *County Palatin*, and that the Lands mentioned in the Decree lay within the said *County Palatin*, and Matters in Question arose there; and that by the ancient Privileges and Usages in the said *County Palatin*, such Parties and Matters were and ought to be sued and impleaded there, and not elsewhere, and that the Decree in itself was just, and not questionable in this Court.

For the Plaintiff it was insisted, that the Court of *Chancery* was the Supreme and high Court of Equity; and it was therefore but just and natural, that an Appeal should lie to it, to correct the Mistakes and Abuses of the Inferior Courts. And it was said by the Council, that altho' such Bills had not been frequent here, yet they were not without Precedents of the like nature; and they cited the Precedent of *Edwisch* and *Davis*, where such a Plea was over-ruled, and the Defendant

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put to Answer: And the Case of *Humphreyes* and *Griffith*, where in the Equity Courts of North *Wales* they had decreed an Infant to convey; and the Decree was for that Reason reversed in this Court: And they cited a Case in the Lord *Nottingham's* time, where an Appeal from the *Mayor's* Court in *London* was allowed; but they were not relieved in that Case, because they had first brought a *Certiorari* Bill, and afterwards consented to a *Procedendo*, and by that had disclaimed the Jurisdiction of this Court; and therefore the Court would not entertain them upon their Appeal.

The Council for the Defendant chiefly insisted on the Practice of this Court, that such Bills had not been usual, and that most of the Cases cited were *Certiorari* Bills; and that all Courts of Equity were by Prescription, and therefore were all equal; and no Appeal would lye.

A *Certiorari* Bill may be brought to remove a Cause out of a Court of Equity in a County *Palatine* to this Court.

The *Lord Keeper* declared, he thought it reasonable, that an Appeal should lye. There is no doubt but a *Certiorari* Bill might have been brought to remove this Cause: But no Bill of Review can be brought, for that is only to re-inspect what the same Court had before done. As to an Appeal it seemed to him reasonable. *First*, Because this Court is the High and Supreme Court of Equity, and the others are but inferior Courts. *Secondly*, Even from this Court there formerly lay an Appeal to the *King*, and that was the Course, till the *House of Lords*, which is the Highest Court, had frequent Meetings, and there determined all Matters upon Appeal: And if from this Court there lyes an Appeal to the *King* himself, why should there not lye an Appeal from inferior Courts to this Court, where the *Chancellor* or *Keeper* sit by the *King's* Commission. There is no doubt, but this Court may hold Plea for Matters within the County *Palatine*, because the Parties may live out of the Jurisdiction.

Vid. post Case 181 & 182.

Where it was adjudged an Appeal would not lye, and the Plea in this Case was allowed.

The *Lord Keeper* would do nothing in the Case at this time, but directed them to attend him with Precedents.

The

The Lady Bodmin versus Vandenbendy.

Case 171.

Eodem die.

In Court
Lord Keeper.

2 Ch. Rep.

172.

Cases in Parl.

69.

Bill by a Dow-
er's to remove

a Trust Term.

Defendant

pleads himself

a Purchasor, but

does not deny

Notice.

Ordered to

answer.

THE Bill was, that the Plaintiff might by the Aid of this Court be let in to try her Title at Law, for Dower of the Lands in question, there being a Term for Years standing out, that had been raised for particular Purposes, and she offered by her Bill to discharge the Trust of the Term, and prayed that the Term might be made Attendant on her Dower.

To this the Defendant pleaded himself a Purchasor, (but did not plead himself a Purchasor without Notice) and insisted on the Benefit of the Term to protect his Purchase.

The Defendant was ordered to answer.

Knight versus Bampfseild & al'.

Case 172.

Eodem die.

In Court
Lord Keeper.

A Jointure made of an Equity of Redemption: the Husband becomes a Bankrupt, and the Assignees of the Commissioners state an Account with the Mortgagee.

If the Jointress will be relieved against this Account, she ought in her Bill to assign particular Errors.

A Man makes a Mortgage, and after Forfeiture for Non-payment of the Mortgage-mony he Marries, and conveys the Equity of Redemption to Trustees, to the Use of himself for Life, Remainder to his Wife for her Jointure, and afterwards becomes a Bankrupt. The Commissioners assign this Equity of Redemption in Trust for the Creditors, and the Assignees state an Account with the Mortgagee.

The Jointress brings her Bill to be relieved against this Account, alledging it was not fairly stated, but that the Assignees by Combination with the Mortgagee, had allowed more Money than was really due on the Mortgage.

The Defendant pleaded this stated Account.

Lord

Lord Keeper. The Assignees stand in the place of the Husband, and the Account by them stated ought to be as conclusive, as if it had been stated with the Husband; and the Bill is not right in charging a general Fraud in the stating of this Account, but the Plaintiff ought to have assigned particular Errors in the Account; however he gave the Plaintiff leave to amend her Bill.

Case 173.

Eodem die.

*In Court**Lord Keeper.*

Bill brought by an Obligee in a Bond against the Heir of the Obligor for a Satisfaction of the Debt out of Assets, but it is not shewn, that the Heir was bound in the Bond.

A good Cause of Demurrer.

Crosseing versus Honor.

BILL brought by the Obligee in a Bond against the Heir of the Obligor, alledging that he having Assets by descent ought to satisfy this Bond.

The Defendant demurred, because the Plaintiff had not expressly alledged in the Bill, that the Heir was bound in the Bond; and tho' it was alledged that the Heir ought to pay the Debt, yet that was held insufficient, and the Demurrer was allowed.

Case 174.

Eodem die.

*In Court**Lord Keeper.*

A Freeman of London leaves the City and lives in the Country 20 Years; marries, and makes his Wife a Jointure and dies.

The Wife shall have her Share by the Custom.

Rutter versus Rutter.

A Man that was a Freeman of London leaves the Town, and lives in the Country for twenty Years together, and Marries, and makes his Wife a Jointure, and dies. She exhibits her Bill to have her Share of her Husband's Personal Estate according to the Custom of the City of London. The Defendant pleaded the Husband's leaving the Town, and living twenty Years in the Country, and the Jointure. But the Plea was disallowed.

Case 175.

Eodem die.

*In Court.**Lord Keeper.*

Bill for discovery only of a Bond lost.

Anonimus.

WHERE a Man brings a Bill for discovery of a Bond, he need not make Oath he has lost the Bond;

Bond; as he must do, if the Bill was to be relieved for the Duty.

No Affidavit necessary. Otherwise if relief prayed. *Ante Case 56. con'. Post Case 241. accord. Case 176.*

Cevill versus Rich.

UPON a Rehearing; the Question was, whether an Advancement of a Daughter on Marriage by Land of Inheritance was such an Advancement as should exclude her from her Customary Part of the Personal Estate of her Father, who was a Freeman of *London*? In the Case of the Son and Heir at Law, it was admitted it would not exclude him: But in this Case there being two Daughters and Coheirs, and one being advanced by Land of Inheritance on her Marriage, the Case is more doubtful, and the *Lord Keeper* ordered that the *Recorder* should certify the Custom of the City of *London* in that Point.

25 Junij. In Court Lord Keeper. Whether a Settlement of Land on a Daughter upon her Marriage will bar her of her Share of her Father's Personal Estate by the Custom of *London*. *Post Case 213.*

Davies versus Weld & al'.

Case 177. In Court Lord Keeper.

THE Defendant *Weld* was the surviving Trustee in a Settlement made on the Marriage of the Plaintiff *Davies* and his Wife, whereby Land was settled upon the Baron and Feme for their Lives, Remainder to Trustees to preserve contingent Remainders, Remainder to their first and every other Son in Tail Male. The Plaintiff and his Wife had been married 12 Years, and never had any Issue, and having contracted Debts, the Bill was, that they might be enabled to sell Part of their Estate for Payment of Debts.

2 Ch. Rep. 144 Whether a Trustee for preserving contingent Remains shall be decreed to join in a Sale to pay Debts, when there is no Probability of Issue.

The Defendant, the Trustee, by Answer set forth the Settlement, and confessed the Plaintiffs had been married so many Years, and had had no Issue, and believed they never would have any, and that they had contracted such Debts, and submitted to do, as the Court should direct, so as he might be indemnified.

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For

For the Plaintiff it was insisted, that the Court in such Cases had decreed the Land to be sold for Payment of Debts; and for Precedents they cited the Case of *Digby* and *Cornwallis*, and Sir *John Tuston's* Case, and they said, that Necessity does create a natural Equity.

But the *Lord Keeper* declared, he did not see how he could make such a Decree; for he had known, where People had been married near 20 Years without Issue, and after had Children: But at the Plaintiffs Importunity he gave time till *Michaelmas* to attend him with Precedents.

Case 178.

Lomax versus Bird.

He that comes to redeem a Mortgage, must shew a Title to the Equity of Redemption.

THE Plaintiff claiming under the Heir general came to redeem a Mortgage. The Defendant by Answer set forth a Deed of Intail, intitling another Person to the Equity of Redemption.

The Plaintiff prayed he might redeem at his Peril, but the *Lord Keeper* would not admit him to do it, unless he could make out that the Estate Tail was docked.

Case 179.

Thorne versus Thorne.

4 Julij.

Lord Keeper.

Mortgage in Fee is a Revocation *pro tanto* only of a Settlement with Power of Revocation.

THORNE being seized in Fee by a Voluntary Conveyance settles his Lands to the Use of himself for Life, Remainder to his Daughter and Heir apparent in tail, Remainder to his three Brothers in tail, Remainder to himself in Fee, with Power of Revocation: and seven Years after mortgageth those Lands in Fee, and the Condition of the Redemption was, that if the Mortgagor or his Heirs paid the Mony at the Day, he should have the Lands in his former Estate. The Mortgage was made to one of the three Brothers that were the Remainder Men. The Mortgage became forfeited, and the Mortgagee afterwards purchased of his eldest Brother, who was the Heir at Law.

The

The third Brother brought his Bill for a third Part, by vertue of the Remainder in Tail limited to him and his two Brothers: and the Question was whether the Mortgage was a total Revocation or but *pro tanto*.

The Lord Keeper declared it was a Revocation *pro tanto* only, the Mortgagor being to have the Lands, on Payment, as in his former Estate, and Decreed it accordingly.

George Talbot, Plaintiff.

Edward Braddill, Defendant.

Case 180.

Lord Keeper.

THE Plaintiff being seized in Possession of Lands of Mortgagor admitted to redeem before the Day of Payment in the Deed. 15 *l. per Ann.* and in Reversion after the Death of his Mother of other Lands of about 17 *l. per Ann.* and of other Lands after a Term of twenty six Years to come of 8 *l. per Ann.* (which Estate was subject to Incumbrances) did by Deed and Fine in *March 1657*, in consideration of 320 *l.* demise those Lands to the Defendant for 99 Years at 5 *s. per Ann.* Rent, upon condition, that if the Plaintiff or his Heirs should pay the Defendant 380 *l.* the 25th of *March* which should be in the Year 1688, then the Conuzees should stand seized to the Use of the Plaintiff and his Heirs: and the Plaintiff covenanted for the Defendant's Enjoyment accordingly.

And now in 1682, 25 Years after the Conveyance, the Plaintiff brings his Bill to be admitted to redeem the Premises, and to have an Account of Profits from the date of the Deed, alledging that tho' the Deed was in that form, yet it was nevertheless agreed between him and the Defendant, that it should be a Mortgage, and redeemable at any time upon Payment of 320 *l.* and Interest; and tho' there was no Proof of any other Agreement than the Deed, and that there was a Bond to perform the Covenants of the Deed,

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and

and altho' it appeared, that the Estate consisted much in old Buildings and a Mill, and that the Defendant had laid out above 100*l.* in Repairs; yet in regard the Plaintiff's Mother died within three Years after the Deed, whereby the Revenue exceeded the Interest of the Mony, the Lord Keeper, notwithstanding there was a Contingency at the time of the Deed, thought this an unreasonable Bargain, and did decree an Account of the Profits *ab origine*, and a Redemption on Payment of what the Profits fell short of the 320*l.* and Interest, and appointed the same to be paid at a Day certain, and not to expect till 1688 according to the Condition of the Deed.

Cafe 181. *Jennet & Ux', versus Bishopp & al'.*

14 Julij.

In Court
Lord Keeper.

No Appeal lies
to this Court
from a Decree
in a County
Palatin.

See the next
Cafe.

THE Bill was a Bill of Appeal and Review, the Cause having been heard and decreed in the County Palatin of Chester. To this Bill the Defendants Demurred. And after long debate the Lord Keeper allowed the Demurrer, and declared his Opinion to be, that such a Bill would not lye: But if any Appeal lies, it must be to the King himself.

Partington versus Tarback.

Cafe 182.

Eodem die.

In Court
Lord Keeper.

Vid. ante Cafe
170.

THIS Bill being of the same Nature with the last Cafe, the Lord Keeper gave the same Rule in it, and allowed the Plea.

Killigrew versus Killigrew.

Cafe 183.

Eodem die.

Outlawry no
bar to the Suit
of an Executor.

THE Bill being to be reliev'd touching a Debt due to the Plaintiff as Executor, the Defendant pleaded an Outlawry of the Plaintiff in Barr: but the Plea was overruled, the Plaintiff suing in *anter Droit* as Executor.

Somerſet

Somerſet verſus Fotherby.

Caſe 184.

Eodem die.

THE Bill being to examine Witneſſes in *Perpetuam rei memoriam* to prove a *Modus Decimandi*, the Defendant demurred, for that the Bill was to Eſtabliſh a Custom againſt the Church, and in Prejudice of Tythes, that are due *comuni jure*: And ſeveral Precedents were cited, where Bills to have a *Modus* decreed were upon a Demurrer diſmiſſed: But this Bill being only to preſerve Teſtimony, the Lord Keeper thought it reaſonable the Defendant ſhould Answer, and over-ruled the Demurrer.

Bill lies to perpetuate the Teſtimony of Witneſſes to prove a *Modus*. But *Q.* it it will lie to eſtabliſh a *Modus*.

Price verſus Price.

Caſe 185.

Eodem die.

TO the Plaintiff's Bill the Defendant pleaded, he was a Purchaſor *bona fide* for a Valuable Conſideration; But there being ſeveral badges of Fraud alledged in the Bill, tho' the Defendant in his Plea had denied them, yet becauſe he had not denied them by way of Answer, that ſo the Plaintiff might be at Liberty to except, the Plea was over-ruled.

Plea over-ruled, becauſe the Fraud alledged in the Bill was denied in the Plea, and not by way of Answer,

LAST Term dyed Sir Edmond Saunders, Lord Chief Juſtice of the King's Bench, and Sir George Jefferies was this Vacation ſworn in his room: Sir Francis Pemberton this Vacation was removed, and Sir Thomas Jones Senior Judge of the King's Bench ſucceeded him as Chief Juſtice of the Common Pleas. And there being two Vacancies in the King's Bench by the Death of Juſtice Raymond, and removal of Sir Thomas Jones, Serjeant Holloway and Serjeant Walcot were made Juſtices of the King's Bench. Sir Francis Pemberton came to the Bar and Practiſed the firſt Day of the Term,

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altho'

altho' it was rumour'd, he was forbid to Practice: and he continued a Privy Counsellor, till the King had struck him out with his own Hand. Mr. Herbert succeeded Sir George Jefferies in the Chief Justiceship of Chester.

In this Vacation the Lord Keeper North was made Baron of Guilford.

D E

Term. S. Michaelis,

35 Car' II. 1683.

IN CURIA CANCELLARIÆ.

Anonimus.

Case 186.

WHERE a Man is to perfect his Answer upon Interrogatories, or to be examined for a Contempt, altho' the Rule of Court be, that he shall be examined in four Days or stand committed; yet if the Party be in the Country, he shall have a Commission to take his Examination.

Edmunds versus Povey & al'.

Case 187.

15 Octob.

*In Court
Lord Keeper.*

THE Principal Question in this Case was touching the buying in of Incumbrances, viz. where there are first, second and third Mortgagees, who had all lent their Money without Notice. The third Mortgagee hearing of the two former Securities buys in the first Incumbrance, to wit, a Judgment that was satisfied: and it was strongly insisted at the Bar, that tho' this Trade of buying in Incumbrances had been formerly countenanced here, yet that it was in truth a thing against Conscience, and contradictory to many Establish'd Rules of Law and Equity.

Third Mortgagee without Notice at the time of his Mortgage buys in the first Incumbrance, being a satisfied Judgment.
He shall have the Benefit of it.

But

But after long Debate the Lord Keeper told them, he wonder'd the Council lay'd their Shoulders to a Point, that had been so long since settled, and receiv'd as the constant Course of *Chancery*. It is true, there have been strong Arguments us'd against the Unreasonableness of this Practice, and there might be likewise strong Reasons brought for the maintaining of it, and so was at first a Case very disputable; but being once solemnly settled, as it was in the Case of *Marsh* and *Lee*, he would not now suffer that Point to be stirr'd.

1 Ch. 162.

The Council in their own Justification replied, That his *Lordship*, when this Cause came first before him, had referred it to Sir *Adam Ottley*, to state the Case specially, and it now came before him on the Master's Report, and there was no other Point in the Case but this; and therefore they supposed his Lordship intended they should be at Liberty to speak to that Matter.

But his Lordship declared, he would not change the Rule, that had so long prevailed in this Case; but it may be, he might do so, where he found a Man designing a Fraud, and thought to make a Trade of Cosening by the Rules of the Court.

Serjeant *Pemberton* moved, that as to the Point of Notice he supposed his Lordship meant, that a Man that buys in a Prior Incumbrance, must do it without Notice of the Middle Incumbrance, not only when he lent his Mony, but also at the time when he bought in the Prior Incumbrance. *Sed non allocatur.*

Case 188.

Chapman versus Bond.

29 Octobris.

In Court
Lord Keeper.

A Purchaser
takes a Term
in a Trustee's

WHERE a Man takes an Assignment of a Term in a Trustee's Name, and the Inheritance in his own Name; so that by Construction in Equity the Term

is attendant upon the Inheritance; this Term in Equity shall be Assets for the Payment of Debts, as well as a Term taken in his own Name is Assets at Law: But with this difference, that the Heir shall have the Benefit of the Surplus of the Trust of a Term, and not the Executor after Debts paid: But if a Term be expressly declared by Deed to be Attendant on the Inheritance, there such a Term shall not be made Assets in Equity.

Name, and the Inheritance in his own; this Term, unless declared to attend the Inheritance, will be Assets in Equity. If he takes the Inheritance in a Trustee's Name, and a Term in his own, it will be Assets at Law. *Id. 2. Ch. Rep. 152.*

Note, This Point was not directly in the Case, but came in by way of Argument only: And so the difference that had been formerly taken in this Case between Legal and Equitable Assets was exploded.

Tremaine versus Tremaine.

Case 189.

THIS Cause was between Father and Son, and there having been great Heat and indecent Reflections on both Sides in Bill and Answer, and the Matter being ended this Vacation by Compromise; Upon Motion this Day made in Court by Mr. Porter, the Bill and Answer were taken off the File by Consent.

Bill and Answer (the Cause being agreed) ordered to be taken off the File by Consent of Plaintiff and Defendant.

Comes Ranelagh versus Hayes.

Case 190.

THE Earl of Ranelagh assigns several Shares of the Excise in Ireland to Sir James Hayes, and Sir James Covenants to save the Earl harmless in respect of that Assignment, and to stand in his Place touching the Payments to the King, and other matters, that were to have been performed by him. The Plaintiff the Earl of Ranelagh suggests in his Bill, that he is sued by the King for 20000*l.* and that the Defendant Sir James Hayes by the Agreement ought to have paid it; and therefore prays the Defendant may be decreed to perform the Agreement in Specie.

30 Octobris.
In Court.
Lord Keeper.
2 Ch. Rep. 146.
Covenant to save harmless.
Decreed in Specie.

It was insisted for the Defendant, that here was no proper Subject for Equity, nor any Thing that the Court could Decree; For here was no Specifick Covenant, but only a General and Personal Covenant for Indempnity; And that was not decreable in Equity; for it sounds only in Damages, which cannot be ascertained in this Court; especially as this Case is, there being no Breach of the Covenant assigned in the Bill: For a Suit being brought by the King, that is not in it self any Breach, for the Defendant cannot prevent that. He will defend the Suit, and if nothing is recovered, there is no Breach.

But the *Lord Keeper* in this Case thought fit to decree that Sir *James* should perform his Covenants; and directed it to a Master, and that *toties quoties* any Breach should happen, he should report the same specially to the Court; and the Court then might, if there should be occasion, direct a Tryal at Law in a *Quantum damnificatus*: and he conceived it reasonable, that Sir *James Hayes* should be decreed to clear the *Earl of Ranelagh* from all these Suits and Incumbrances within some reasonable time. And he compared it to the Case of a Counterbond; where altho' the *Surety* is not troubled or molested for the Debt, yet at any time after the Mony becomes payable on the Original Bond, this Court will decree the *Principal* to discharge the Debt; It being unreasonable that a Man should always have such a Cloud hang over him.

A is bound for B, and has a Counterbond. Equity will compel B to pay the Debt, tho' A is not sued.

Case 191.

6 Novembris.

In Court
Lord Keeper

2 Ch. Rep. 147.
ante Case 31.

No Agreement in a Mortgage can make it irredeemable, either after the Death of the Mortgagor, or

Howard versus Harris.

MR. *Howard* settles a Jointure on Plaintiff his Lady before Marriage, which proving defective, and not of Value according to the Marriage Agreement, he therefore afterwards makes her an additional Jointure of other Lands; and afterwards Mr. *Howard*, in 1673, makes a Mortgage to the Defendant *Harris* for securing 1000 l. with Interest, in which (amongst others) part of the Lands belong-

belonging to the additional Jointure was comprised : And in the Mortgage there is a special Clause of Redemption, viz. that if Mr. Howard, or the Heirs Males of his Body, should in June 1686 pay the Principal Sum of 1000 l. and 60 l. per Ann. Interest in the mean time, then Mr. Howard or the Heirs Males of his Body might re-enter; and Mr. Howard Covenants that no one but he or the Heirs Males of his Body should be admitted to redeem this Mortgage, and likewise Covenants to pay the 1000 l. on the day of _____ in the Year 1686, and 60 l. per Ann. Interest in the mean time, by half-yearly Payments from the Date of the Mortgage.

upon failure of
Issue Male of
his Body.

Mr. Howard dies without Issue; the Plaintiff being a Jointress of part of the Mortgaged Lands, and so intituled to redeem the whole, in 1677 exhibits her Bill to redeem this Mortgage.

The Defendant by Answer insists, the Lands are now become irredeemable.

This Cause was heard before the Lord Chancellor Nottingham; and now upon the Defendant's Petition came to be reheard before the Lord Keeper, and was by them both decreed for the Plaintiff.

For the Plaintiff it was insisted,

First, That Restrictions of Redemption in Mortgages have been always discountenanced in this Court; and it would be a thing of mischievous Consequence, should they prevail; for then it would become a common Practice, and a Trade amongst the *Scriveners*, so to fetter the Mortgagors, as to make it impracticable for them to redeem according to the Precise Letter of the Agreement: And the Plaintiff's Council insisted, that there was no more in this Case against a Redemption, than there was in every Mortgage. It is true, here is an exprefs Covenant, that

Restrictions
of Redemption
in Mortgages
discountenanc'd
in Equity.

none

none but Mr. *Howard*, or the Heirs Males of his Body, should redeem: And in every Mortgage there is a Proviso, that in case the Money be not paid by such a Day, the Mortgagee shall hold the Land discharged, and not only so, but there is likewise an express Covenant for further Assurance; so that in every Mortgage the Agreement of the Parties upon the Face of the Deed, seems to be, that a Mortgage shall not be redeemable after Forfeiture.

Maxim in Equity, that an Estate cannot at one time be a Mortgage, and at another time cease to be so, by the same Deed.

Secondly, It was argued, that it was a Maxim here, that an Estate cannot at one time be a Mortgage, and at another time cease to be so, by one and the same Deed: And a Mortgage can no more be irredeemable, than a Distress for a Rent-charge can be irrepleviable. The Law it self will control that express Agreement of the Party; and by the same Reason Equity will let a Man loose from his Agreement, and will against his Agreement admit him to redeem a Mortgage.

A Mortgage cannot be a Mortgage of one side only.

Thirdly, It is another standing Rule, that a Mortgage cannot be a Mortgage of one Side only: and here it is plain, Mr. *Harris* may make it a Mortgage; for he has a Covenant for the Repayment of his Mortgage-money. And for Precedents was cited the Case of *Killington* versus *Gardiner*, who was to redeem at any time in his Life-time; and Sir *Robert Jason's* Case.

For the Defendant it was insisted, that this express Agreement of the Parties ought to be pursued; and they pretended the same was made upon good Consideration, viz. that the Defendant *Harris* had formerly purchased these very Lands from Sir *Robert Howard*, Father of the Plaintiff's Husband, who pretended himself to be seized in Fee; but this Land was afterwards evicted, upon pretence that Sir *Robert* was only Tenant for Life; and the Reason of this Special Clause of Redemption was, that in Case Mr. *Howard* should have Issue Male, the Estate might remain in the Family; but if he had none, it should be left to the Defendant, as something towards a Compensation for

for the Loss in his Purchase, and Mr. *Harris* was to submit to the Loss, and not to question Mr. *Howard's* Title. But as to this they had not a Word of it in Proof, saving only, that the Defendant had made such a Purchase; but not that this was the Consideration of the Agreement: And it likewise appeared, that Mr. *Howard* claimed by an ancient Settlement from the Lord *Suffolk*, and not by any Settlement made by his Father Sir *Robert*.

Then it was insisted, that this additional Jointure was voluntary, and the Plaintiff ought not to take the Estate out of the Hands of a Purchaser. But it was answered, he was a Purchaser for no more than his Mortgage-money; and one that comes in by a voluntary Conveyance may redeem a Mortgage: And if the additional Jointure was voluntary; so likewise was the Agreement, that none but Mr. *Howard* or the Heirs Males of his Body should redeem; and that was subsequent to the additional Jointure.

One that claims under a voluntary Conveyance may redeem a Mortgage.

And it was further urged, that the Mortgaged Estate is a Reversion after Lives only, and is at present but 7 *l. per Ann.* and that Mr. *Harris* did actually borrow the Mortgage-money to lend on this Reversion; and it could not be presumed he would have so done, unless it had been in Consideration, that this Mortgage had been made in a special manner redeemable.

But it was answered, that possibly the Defendant might design such a catching Bargain of this Mortgage; but that was a sort of Circumvention, and the worst part of the Case.

After long Debate, the Lord Keeper decreed, the Mortgage should be redeemed; the rather for that the Defendant had a Covenant for Repayment of his Mortgage-moneys; but said, if the Case had been, that a Man had borrowed Money of his Brother, and had agreed to make him a Mortgage, and that if he had no Issue Male, his

Vid. Case of Newcomb versus Bonham Ante Case 6.

D d d

Brother

Brother should have the Land; such an Agreement made out by Proof might well be decreed in Equity.

But then for the Defendant the Mortgagee it was insisted, that this Mortgage having been made 10 Years since, and of a Reversion, where 7*l. per Ann.* Rent was only reserved; that in this Case the Defendant ought to have Interest upon Interest, otherwise he would be a great Loser in this Case.

But as to that, it was answered, that the Plaintiff's Bill to redeem was filed so long since as 1677, and that the Defendant had by Answer opposed the Redemption; and therefore from that time he had no Pretence to an Allowance of Interest for his Damages: And it was never known in this Court, that Interest upon Interest was at any time allowed in any Case.

Where there was a great Arrear of Interest due on a Mortgage, Interest allowed for the Interest reserved in the Body of the Deed.

But the *Lord Keeper* was clear of Opinion, that as to so much Interest as was reserved in the Body of the Deed, that should be reckoned Principal; for it being ascertained by the Deed, an Action of Debt would lye for it; and therefore it was reasonable that there should be Damages given for the Non-payment of that Mony. And whereas it was urged, that this had never been practised, and that there was not any such Precedent in the Court; and that if this were to be Established for a Rule, every Scrivener would reserve all his Interest half-yearly, from time to time, as long as the Mony should be continued out upon the Security; which would be to change the Law and Practice in this Court, and make all Mortgagees pay Interest upon Interest.

But the *Lord Keeper* said, he was clear in that distinction between Debt and Damages; And he saw no Inconvenience that could ensue: it would serve only to quicken Men to pay their just Debts; and accordingly decreed, that after a deduction of the Yearly Rents of the mortgaged Premises

out

out of the 60 *l.* a Year payable for the Interest, the Defendant should be allowed Interest for the residue of the said 60 *l.* a Year, for which the Defendant might have sued at Law and recovered Damages.

Lyford versus Coward.

Case 192.

Eodem die.

In Court

Lord Keeper.

THE Plaintiff having enjoyed a Copyhold for 40 Years under a Will, and having been admitted at the next Court after the Will made, came here to be relieved, and to have the Defect of a Surrender to the Use of the Will supplied, such Surrender not being now to be found; as also the Defendant having brought a Writ of *Ayle* in the Court *Baron*, it was suggested in the Bill, that a Court *Baron* was not proper, by reason of the Difficulty, for the Tryal of such an Action.

Whether after 40 Years possession of a Copyhold under a Will, a Surrender to the Use of the Will shall not be presumed.

For the Plaintiff it was said, it was a plain Equity, that after 40 Years Enjoyment, the defect of the Surrender should be supplied, and cited the Case of *Griffith and Lloyd*.

The *Lord Keeper* was clear, that the want of a Surrender should be supplied; Surrenders being kept by the Lord and his Stewards, who are oftentimes changed, and not so careful as they should be; and therefore a Surrender might be lost without the Default or Negligence of the Party; and he was about to have decreed the Land to the Plaintiff. But it being urged by the Defendant's Council, that in this Case they contested even the Will it self, as well as the Surrender; and as to the Enjoyment, the Defendant was an Infant 18 Years of the 40, and they conceived the length of time ought not to be any bar to the Defendant's Right in this Case; for that by the *Stat'* of Limit. in a Writ of *Ayle* the Plaintiff may declare of Seisin in his Ancestor at any time within 50 Years.

32 H. 8.

Where-

Whereupon *Lord Keeper* decreed, the Defendant should admit a Surrender, and directed an Issue, *Will or no Will*; but the Defendant's Council insisting that the pretended Testator was also *non Compos* (which as was said ought to be pleaded specially) they desired, *Compos vel non*, might be the second Issue. At last it was agreed, it should be tried in a Ejectment, where the whole matter might come in Evidence, and the Plaintiff was not to insist on his long Possession.

In this Case were cited the following Cases, *viz.* *Biden* versus *Loveday*, 14 *Junij*, 11 *Car.* 1. where Lessee had been 25 Years in Possession, and the Lessor would have avoided the Lease for want of Livery, this Court presumed Livery, and decreed the Lessee should hold out during the continuance of his Lease, tho' after long possession Courts at Law will presume Livery. *Pencose* versus *Trelawny*, 2 *Julij*, 35 *Car.* 2. where in regard the Plaintiff had 40 Years possession of a *Piscary*, the Court decreed the Defendants to surrender and release their Title to the same, tho' the Surrender made by the Defendants Ancestors was defective, and that the Plaintiffs should hold and enjoy against the Defendants.

Case 193.

7 Novembris.

In Court
Lord Keeper.

1 Ch. Rep. 152.

A Surety not
chargeable in
Equity further
than he can be
by Law.

Ratcliffe versus *Graves & al.*

WALTER *Ratcliffe*, Plaintiff's Father, having made his Will, and Plaintiff and his Brother *John* Executors and Residuary Legatees, and they being Infants at their Father's Death, Administration with the Will annexed during their Minority was granted to *Eliz. Ratcliffe* their Mother; and the *Prerogative* Court upon granting the said Administration took the usual Bond from the Administratrix, in which the two Defendants the *Heathers* were bound, as her Sureties.

The Plaintiff's Brother being dead, and having made his Will and Plaintiff Executor, he now brought his Bill

for an Account of the Testator's personal Estate, and as to the Defendants the Sureties, it was suggested, that by *Fraud* and *Covin* they had got up their said Bond, and had procured insufficient Security to be accepted by the *Prerogative* Court in the Room thereof.

But the *Lord Keeper* upon the first opening of the Matter declared, he would not charge the Sureties further, than they were answerable at Law; and dismissed the Bill as to that Part.

Another part of the Case was, that the said Administratrix having had the Intestate's Estate long in her Hands, and Employed the same in Trade, and received Interest for some Part thereof, It was prayed, that she might answer Interest for it.

The *Lord Keeper* was clear of Opinion, that she ought to answer Interest for it; for he thought it reasonable, that Executors in all Cases should answer Interest, if they had used the Mony in Trade, or received any Interest for it, and not turn the same to their own Private Advantage: the only Objection against it was, that if the Mony should miscarry, or be lost, the Executor must stand to the Loss of it: But now every one knows a Man may insure his Mony for *One per Cent*; and therefore decreed, the Administratrix should accompt for Interest, unless she made Oath, that she had kept the Mony by her: altho' it was urged, that the constant Practice of the Court had been otherwise for twenty Years past, and more; and that there were above 40 Precedents in the Case; and the Cases of *Hastlewood* and *Baldwin*, and *Gardener* and *Cartwright* were cited, in which last Case it was fully in Proof, that the Executor had received Interest, and therefore it was Decreed, that he should account for such Interest as he had received; but this Decree was afterwards reversed upon an Appeal to the *House of Lords*. But notwithstanding these *Precedents* it was decreed *prout supra*.

Executor shall answer Interest, if he has made any of the Testator's Estate.

Cafe 194.
10 Novembris.

*Charles West Esq; versus Lord Delaware
and Sir John Cutler.*

*In Court
Lord Keeper.*

A Father on the Marriage of his Son articles to settle a Jointure on the Wife, and her Issue, but no Provision is made for the Son during his Life.

The Father has the Portion, and the Wife dies without Issue

Whether the Son is intitled to any Estate in the Lands.

THE Plaintiff being the Son and Heir of the Defendant the Lord *Delaware*; there were Articles made on the Marriage of the Plaintiff with one Mrs. *Huddleston*; whereby the Lord *Delaware*, in Consideration of 10000 *l.* Portion to be paid or secured unto him by Mr. *Huddleston*, covenants with Mr. *Huddleston* to settle on his Daughter 800 *l. per Ann.* for her present Maintenance and Jointure, and 400 *l. per Ann.* more after the Death of his Lordship's Mother, Remainder to her Issue, and that after his Decease he would make up the 1200 *l. per Ann.* 3000 *l. per Ann.* and that was to be settled on her Issue, and there was a Clause in the Articles, that Mr. *West* should have power to sell 100 *l. per Ann.* of the Premises.

Mrs. *Huddleston* dyes after Marriage without Issue, before the Portion paid, or any Settlement made. Afterwards the Lord *Delaware* has a Decree for the *Ten thousand Pounds* Portion, but by Compromise accepts of 6000 *l.* which his Lordship receives; but refuses to make any Settlement on his Son.

The Bill was to be reliev'd touching these Articles, and to have an Execution of them according to the Meaning of the Parties and an Equitable Construction.

For the Plaintiff it was insisted, that altho' by the Letter of the Articles there is no Agreement for settling any Estate upon the Son, yet it is strongly implied; and the Intent of the Parties can't be presumed to be otherwise: and if these Articles had been carried to any Lawyer to have drawn a Settlement in pursuance of them, no one will say, but they would have limited an Estate for Life to Mr. *West*.

First, It was urged, that the Word *Junctura*, Jointure, *ex vi termini*, implies an Estate for Life to the Husband.

Secondly, That the Portion was a Consideration moving from Mr. *West*, and such a Consideration as would make him a Purchaser.

Thirdly, That it would be a most unnatural Exposition of the Articles, to say the whole Estate should be limited to the Wife, and nothing to the Son, and thereby to make the Son beholden to his Wife for Maintenance out of his own Estate.

Fourthly, That it is impossible to draw a Conveyance exactly pursuant to the Letter of the Articles, for in Case the Lord *Delaware* had dyed in the Life-time of Mr. *West* his Son, the Contingent Remainders to the Issue had been destroyed.

But for the Lord *Delaware* it was insisted, and so he had sworn in his Answer, that the Articles were made according to the Agreement, and that they were so Penn'd on purpose, that if his Son's Wife should die without Issue, the Estate might revert to him again, and he might have his Son in his Power, as to a second Match.

After long Debate the Lord *Keeper* told them, that each of them were unreasonable, and held too fast; that on one side it was too much to ask all the Estate; for that the Lord *Delaware* had but 6000*l.* of the Portion: And on the other hand it was too hard for the Lord *Delaware* to refuse to make any Settlement at all: But he advised them to end the Matter by Compromise, and proposed it should stand referr'd to the *Attorney General* and Sir *Francis Pemberton*.

Case 195.

Goodwin versus Ramsden.

13 Novembris.

*In Court**Lord Keeper.*

A Man dies
Intestate with-
in the Province
of *York*, all
his Children
being advan-
ced in his Life-
time.

His personal
Estate shall be
distributed ac-
cording to the
Statute of Di-
stributions.

THE Plaintiff's Bill was to have an Accompt, and her Share of her Father's personal Estate, who died Intestate.

The Defendant pleaded, that the Estate in Question lay within the Province of *York*, and that the Intestate died there, and that the Plaintiff, being one of his Daughters, was advanced by him in his Life-time; and that by the Custom of the Province of *York*, a Daughter, being once advanced by her Father in his Life-time, was excluded from all further Benefit of her Father's personal Estate.

But in this Case, it appearing that all the Children of the Intestate were advanced by him in his Life-time, and so the Estate wholly exempted out of the Custom of the Province of *York*, it ought to go now in a Course of Administration, and be distributed according to the Act for settling Intestates Estates; and thereupon the Plea was over-ruled.

Case 196.

Day and Ux' versus Chapfeild.

Eodem die.

*In Court**Lord Keeper.*

If an Executor
dies before Pro-
bate of the Will,
his Executor
cannot prove
it; but Admini-
stration *cum*
Testamento, &c.
must be grant-
ed to the Resi-
duary Legatee,
(if any) or to
the next of
Kin.

WHERE an Executor dyes before Probate of a Will, his Executor cannot take upon him to prove that Will, but Administration ought to be granted with the Will annext to the Residuary Legatee, if there be any, or else to the next of Kin, according to the Resolution in *Isted's Case*, in *Dyer* fo. 372.

Moore

Moore versus Hart.

Cafe 197.

14 Novembris.

In Court
Lord Keeper.

Ante Cafe 100.

THE Bill was to have an Execution of a Marriage Agreement, setting forth, that the Defendant had made great Application to the Plaintiff's Friends and Relations, that the Plaintiff might become a Suitor to his Daughter, (and at first promised to give his Daughter 3000 *l*; but the Defendant afterwards finding the Plaintiff's Affection settled upon his Daughter, receded from his Promise, and then pretended he could not give her so much; and thereupon on the 6th of *Jan.* 1680, a Letter was wrote by one Mr. *Reeve*, a Relation of the Plaintiff's, to the Defendant *Hart*, desiring him to be plain, what he would give down with his Daughter. In Answer to which Letter the Defendant on the 10th of the same Month wrote to Mr. *Reeve*, acknowledging the Deferts of the Plaintiff beyond his the Defendant's Ability, and adds further, you desire me to be clear, and say what I will lay down upon the Nail; to which, if you mean in ready Money, my Estate lying in Land, I can say but little; but if it be, to say, what I will give my Daughter at the present, I say with all plainness 1500 *l.* in Land, either at *Creton* or *Wapnam*: But if our difference in the Value of the Land will make Mony more acceptable, I will give the same Sum in Mony out of the Moneys to be raised by Sale of *Creton*, &c. And further setting forth, that in Confidence of this Promise and Agreement, the Plaintiff married the Defendant's Daughter, whereby she would be intituled to Dower, the Plaintiff's Estate being 500 *l.* *per Ann.* in Possession, and as much more in Reversion; and therefore to have the said Promise made good, and the Land stand charged with the 1500 *l.* Portion, according to the Agreement, was the Bill.

The Defendant *Hart* had formerly pleaded the Act of *Frauds* and *Perjuries*, but that was over-ruled by Mr. *Justice*
F f f *Charlton*;

Charlton; and the Defendant now by Answer insisted on the Benefit of that Act of Parliament, and further set forth that after his Letter of the 10th of *Jan.* Mr. *Reeve* wrote another Letter to him to this Effect, viz. that since the Defendant resolved not to be obliged to give 500 *l.* more at his Death, he left the Defendant and the Affair as he found it, &c. And the Defendant said further, that he look'd upon this Letter to be an absolute Waiver of the Treaty, and did not answer it, or after that time treat further with Mr. *Reeve* or any other touching the Marriage; but renewed a former Treaty concerning his Daughter's Marriage with one Mr. *Hart*, who had 6 or 700 *l. per Ann.* and offered to Settle 200 *l. per Ann.* on her: But that before his Daughter returned home from Mr. *Reeve's* House, where she had been, the Marriage with the Plaintiff was had, without the Defendant's Consent or Privy; and insisted that all former Proposals were absolutely waved by Mr. *Reeve's* last Letter; and that if the Plaintiff had any Demands against the Defendant, he ought to take his Remedy at Law; and denied he ever treated about the said Marriage, or made any Promise concerning the Marriage Portion, after that last Letter of Mr. *Reeve's*; and insisted he ought not to be charged.

But it being fully in Proof, that the Defendant *Hart*, upon the Receipt of Mr. *Reeve's* last Letter, came up to Town purposely about this Match, and declared before several Witnesses not above two Days before this Marriage, that he would make his Promise good upon the Word of a Priest, and under bitter Imprecations, that if he did not do it, he and his Posterity might perish, &c. And Mr. *Reeve* likewise deposing, that he never communicated ~~the Defendant's~~ ^{his} last Letter to the Plaintiff, but that the same was wrote without his Privy or Knowledge, the Court decreed the Defendant to pay the Plaintiff the 1500 *l.* Portion, and that the Lands at *Creton* and *Wapnam* should stand charged with the Payment of it; and that the Plaintiff should settle 300 *l. per Ann.* Jointure on his Wife: Tho' for the Defendant it was urged, that this Promise in
Writing

Writing being discharged by a subsequent Letter in writing, it could not now be revived by Parol Discourses.

It was also objected, that the Plaintiff had good Remedy at Law; but it was answered, he was proper in Equity to charge the Lands with the Money by Vertue of the Agreement.

Comes Raneligh versus Thornehill.

Cafe 198.
17 Novemb'ris.
In Court
Lord Keeper.

IN a Bill of Review it was assigned for Error, that the Defendant, who was a Solicitor, had a Decree for his Fees, for which he ought to sue at Law. *Sed non allocatur.* A Man may have a Bill for Solicitor's Fees only, if for business done in this Court: And so he may, where the business is done in another Court, if it relates to another Demand, the Plaintiff makes in this Court.

A Bill may be brought for Solicitor's Fees only, if for Business done in this Court. And so it may, where the Business is done in another Court, if it relates to another Demand made by Plaintiff in this Court.

Carpenter versus Bennet.

A Man upon his Marriage having agreed to settle his Lands, being 100*l.* *per Ann.* upon himself for Life, Remainder on his Wife for her Jointure, the Remainder in tail upon their Issue: And it appearing in the Cause that the Husband had then contracted a Debt of 700*l.* It was decreed the Land should be sold, the Husband's Debt be first paid, and the Residue of the Money laid out in a Purchase of Lands to be settled on the Wife and her Children.

Cafe 199.
Eodem die.
In Court
A Man indebted 700*l.* agrees on his Marriage to settle Lands of 100*l.* a Year on himself for Life, then to the Wife for her Jointure, Remainder in tail upon their Issue.

And a Bill of Review being brought to reverse this Decree, it was assigned for Error, that the Husband had not a sufficient Allowance made him for his Interest in the Premises, and that this being all his Estate, he ought in Equity to have had some Provision made him out of the Estate, which was decreed to be purchased, for his Maintenance.

Decreed the Land to be sold to pay the 700*l.* and the Surplus of the Money to be laid out and settled on the Wife and the Issue. But this Decree reversed on a Bill of Review.

And

And for these Reasons the *Lord Keeper* reversed the Decree, saying, it was hard to compel a Man to sell his Estate for Life for seven Years Purchase: And it was likewise hard the Wife should not allow her Husband Maintenance.

Cafe 200.

Hincks versus Nelthrope.

Bill to establish an Agreement for a Separate Maintenance. To such parts as prayed a Discovery of hard Usage, Defendant demurred. Demurrer allowed.

THE Bill was to establish an Agreement for a Separate Maintenance for the Defendant's Wife. And (amongst other things) prayed a Discovery of several unkindnesses and hardships which the Defendant, as it was pretended, had used towards his Wife to make her recede from this Agreement. To which Discovery the Defendant demurred, for that it was not a Matter properly examinable or relievable in this Court; and the Demurrer was allowed.

Cafe 201.

Lady Poulet versus Lord Poulet.

24 Novembris.

In Court
Lord Keeper.

2 Vent. 366.

Term limited by a Settlement to raise Portions for younger Children payable at 21 or Marriage.

One of them dies under 21 and unmarried.

Her Portion shall not be raised for the benefit of the Administratrix. Otherwise it the Portion was to be raised out of a personal Estate

THE *Lord Poulet*, the Defendant's Father, by Settlement limited a Term to Trustees for the raising of 4000 *l.* apiece for his younger Children for their Portions, to be paid them at their respective Marriages or Ages of One and twenty Years, which should first happen; and for paying unto them 100 *l.* per Ann. Maintenance in the mean time; and after these Portions and Maintenance raised, then the Residue of the Term was to be in Trust for his Heir the Defendant.

The said *Lord Poulet* having two Daughters by the Plaintiff his Second Wife, viz. *Vere* and *Susanna*, makes his Will, and thereby gives to his said Daughters 4000 *l.* apiece for their respective Portions, to be raised and paid them in such Manner as by the said Settlement is directed; but declares, they should have but one 4000 *l.* apiece, and not

not two by the Settlement and Will, unless the Defendant his Son should die without Issue; in which Case he devised, that they should have 2000*l.* apiece more, to be paid in the same Manner as the 4000*l.*

Vere, one of the Daughters, dyed being about 8 Years of Age. The *Lady Poulet* the Mother takes Letters of Administration to her Daughter *Vere*, and exhibits a Bill against the Trustees and the *Lord Poulet* the Heir at Law, to have her said Daughter's Portion of 4000*l.* raised and paid.

In this Case the Question was, Whether the 4000*l.* Portion of Mrs. *Vere Poulet* the Daughter did cease by her Death, or should be raised for the Benefit of her Administratrix.

Lord Keeper said, this was a very hard Demand in Equity; for a Joyntrés, who had already the Provision intended her on her Marriage, and was before a Stranger in the Family, to go away with this 4000*l.* and neither the Heir nor Younger Children benefitted by it, she being not to make any Distribution.

If the 4000*l.* had been to have been raised out of the Personal Estate, it had been clear, the Plaintiff must have had it; but being here a Charge upon the Estate of the Heir, he would consider of the Case, and advise with the Judges about it.

Note, This Bill was dismissed 13th May 1685, and afterwards upon an Appeal to the House of Lords the Decree of Dismissal was affirmed.

Coleby versus Smith.

Case 202.
6 Decembris.

THE Bill was brought by *Coleby* the Plaintiff to be relieved against a Purchase made by the Defendant *Smith & al'* from the Plaintiff's Father, suggesting that he had been circumvented and imposed upon by the Defendants.

In Court.
Lord Keeper.
Articles, and a Conveyance and Fine in pursuance thereof, set aside for Fraud.

G g g

The

The Defendants insisted on their Purchase; and in this Case it appeared, that there were at first Articles for the Purchase under Hand and Seal, and some time after that a Conveyance actually made and executed in Pursuance of these Articles, and the Purchase Mony was all paid or secured; and after all this a Fine levied by *Coleby* the Father to the Purchaser, and *Coleby* writes a Letter to his Tenants to attorne: And because *Coleby* the Son, the now Plaintiff, showed himself discontented at this Purchase, and would have obstructed it, *Coleby* the Father takes a Release from his Son of all his Right to these Lands; Which Release was proved to be so taken with an Intent to establish this Purchase.

Upon the hearing of this Cause the *Lord Keeper* set this Purchase aside, because there appeared to be some Art used to persuade *Coleby* the Father to sell these Lands, *viz.* They persuaded him (he being almost in his Dotage) that they could help him to a great Match, and told him, that to qualify himself for the Lady, it was necessary he should convert all his Land into Mony; which shewed the Man was purely Imposed upon; for here he sells his Land, when he does not want Mony, and sells it to those, who had no Mony to buy, but were to borrow; and he is to receive his Mony by Installments; and when the whole is received, it is much less than the Real Value, and the Defendants in a very little time might have paid the Purchase-mony out of the Profits: And besides, the Defendants never own to him, that they were to be the Purchasers, but drive on the Bargain in one Mr. *Ewre's* Name, and a Letter is wrote by one of the Confederates, as from Mr. *Ewre*, that he must resolve quickly what he would do: and that Mr. *Ewre* would admit of no longer delay in the Matter, &c And for these Reasons the *Lord Keeper* set aside this Purchase.

Tho' Note, it was proved, that *Coleby* the Father was a sensible Man and capable of managing his own Business,

and had not any apparent Weakness upon him; and that he was absolute Owner of this Estate, and might have given it away: And it was likewise proved, that after he had conveyed away the Land, he declared if it were then to do, he would do it again.

Childerns versus Saxby.

Cafe 203.

6 Decembris.

*In Court
Lord Keeper.*

TH E Defendants having taken out Execution in Breach of an Injunction of this Court, and some of the Bayliffs, who served the Execution, having, as was alleged, found out a place in a Wall in the Plaintiff's House, that was made up again with Bricks, wherein was hid 150 *l.* and having taken away the Mony, and done great Spoil to the Plaintiff's Goods, an Order was made by the late *Lord Chancellor*, that the Defendants should make good this Mony to the Plaintiff, and should satisfy all other Damage which the Plaintiff would swear he had sustained.

Bayliffs, who had served an Execution in Breach of an Injunction, find Morey hid in the House, and carry it away. Party, at whose Suit the Execution was taken out, ordered to make Satisfaction.

And now this Matter came before the *Lord Keeper*, and the Defendants complained of this Order as unjust, and without Precedent; the most that has been ever done in this Court in any such Case, was only to put the Parties accused to purge themselves on Oath; but here by this Order the Plaintiff was to be the Judge of his own Damage: And that the Defendants came into Possession by Course of Law, and the Bayliffs were legal Officers: If they did any thing amiss, the Party ought to take his Remedy at Law against them, and the Plaintiff ought not to be answerable for their Misdemeanours.

But the *Lord Keeper* held the Order to be just; and he thought it an idle Practice in the Court to put a Thief to his Oath to accuse himself; for he that has stolen, will not stick to forswear it; and therefore in *Odium Spoliatoris* the Oath of the Party injured should be a good Charge upon

In Odium Spoliatoris, the Oath of the injured Party sufficient to charge the wrong Doer.

upon him that has done the Wrong: and Confirmed the former Order.

Case 204.

Eodem die.

In Court

Lord Keeper.

Potts versus Potts.

It is sufficient for a Servant or Apprentice to say in his Answer in general, that what he received for his Master was laid out again by his Order.

Vid. ante Case 81 & 127.

Case 205.

Vid. ante Case

142.

Commission of Bankruptcy superseded by the Consent of the petitioning Creditors, refused to be revived upon the Application of other Creditors, who had not come in, but desired so to do.

ON Exceptions to a Master's Report, which had reported the Defendant's Answer insufficient, the *Lord Keeper* declared, that it was sufficient for a Servant or Apprentice in answer to a Bill for an Account, to say in general, that whatever he received, was by him received and laid out again by his Master's Order.

The Case of Alderman *Backwell's* Creditors.

SOME of Alderman *Backwell's* Creditors having upon a Petition to the *Lord Keeper* obtained a Commission of Bankruptcy against him, the Commissioners sat and found him a Bankrupt, and made an Assignment, and then Alderman *Backwell* dies in *Holland*. His Son and Heir agrees with all the Creditors, who had Petitioned for this Commission, and thereupon obtains a *Superfedeas*; afterwards the other Creditors hearing of it, they Petition the *Lord Keeper* to grant a *Procedendo*, because a Commission being once granted, and an Assignment made, that was a Trust for all the Creditors of Alderman *Backwell*, that should come in within the *four* Months, which they intended to do, and insisted that the Commission could not be regularly discharged, till after the four Months were past; and tho' it had been sometimes done in other Cases, yet that was where the Creditors might have the same Benefit by a new Commission; but in this Case the Bankrupt being dead, if this Commission should stand Superfeded, the Creditors were without Remedy; and insisted this was a Fraud and Contrivance betwixt the Heir and the other Creditors to defeat them of their just Debts, and ought not to be Countenanced in Equity: And that they

they relied upon it, that they might at any time within the *four* Months have come in, and have had the Benefit of this Commission, otherwise they themselves would have petitioned for a Commission against him.

But the *Lord Keeper* declared, that in any Case, where all the Creditors that Petitioned for a Commission, would afterwards agree to have it discharged, he would never scruple to discharge that Commission; and in this Case mentioned how inconvenient it would be to revive the Commission; for Alderman *Backwell* had Traded considerably since such time as the Commissioners had found him a Bankrupt, and that all the Composition-mony that his Son had paid to his Father's Creditors must be refunded, and that many other Inconveniencies would ensue; and that he had all along determined with himself not to revoke this *Supersedeas*, but had deliberated upon it, that the other Creditors might make the best Terms they could with the Heir, and when they have been fairly offered, if they stood in their own light, they must blame themselves for it: And declared, he would not revoke the *Supersedeas*, nor grant a *Procedendo*.

Carnejew versus Arscott.

Case 206.

15 Decembris.

In Court
Lord Keeper.

ON a Demurrer to a Bill of Review, the Case was; the Plaintiff had granted an Annuity out of certain Lands in *Cornwall* to the Defendant, with a Clause of Distress and *nomine penæ*, and a Power to enter and detain till he was satisfied all Rent in Arrear, and the *nomine penæ*. The Annuitant exhibits a Bill, suggesting that there was no Distress to be found upon the Land, but that it lay Waste; and that if he should enter, he could make no Profit thereof by reason the Land was covered with some old Incumbrances, and his Stock would be swept away; and the Annuity being redeemable on Payment of a Sum of Mony, he pray'd the Defendant might be absolutely

An Annuity is granted out of Lands, and made redeemable on Payment of a Sum of Mony.

The Grantor cannot be foreclosed of the Land, tho' he may of the Redemption of the Annuity.

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foreclosed, even of the Land it self; and it was so decreed *ex Parte* by the Lord Chancellor Nottingham.

And now it was assigned for Error by the Plaintiff, in the Bill of Review, that he ought not to be foreclosed of the Land it self; but at most could be only foreclosed from redeeming the Annuity; and that the *nomine pæne's* should run upon him; and of that Opinion was the Lord Keeper, and therefore reversed the Decree.

Heighter versus Sturman.

Case 207.

15 Decembris,

In Court

Lord Keeper.

Administratrix and her two Children, intitled to a Lease of a House, agreed by Parol to make a Lease thereof to J. S.

The Administratrix executes the Lease.

Upon a Bill to compel the other two to join, they can't plead the Statute of *Frauds*, &c.

AN Administratrix and her two Children being Intitled to a Lease of a House, they all three agree to make the Plaintiff a Lease for Ten Years at a certain Rent. The Administratrix with the Privy of the other two having executed such Lease; the Bill was to compel the other two to execute the same likewise.

The Defendants pleaded the Statute of *Frauds* and *Perjuries*; the Agreement made with them not being reduced into Writing.

But the Lord Keeper over-ruled the Plea, and held that the Administratrix having executed the Lease, this Case was out of the Statute.

Case 208.

Sewell versus Muffon.

A Creditor agrees to take less than his Debt, so as the Money is paid at a certain Day; and the Money not being paid at the Day, he Sues for the whole.

Debtor not relievable.

ACreditor having agreed with his Debtor to take a Sum of Money less than his Debt, so as it was paid precisely by such a Day; he fails of Payment, and now brings his Bill, suggesting some equitable Excuses, why he did not pay precisely at the Day; and that he tendered the Money within a Day or two afterwards, and that the Defendant refused to accept it, and Sued for the whole at Law.

To this the Defendant demurred, for that the Bill contained no Equity: and insisted, that when he made an Agreement in favour of the Plaintiff, he might restrain and qualify it, as he thought fit; and that the Plaintiff having failed of Payment at the Day, the Defendant was not now bound by the Agreement, or obliged to take less than his just Debt.

Lord Keeper allowed the Demurrer, and said, *Cujus est dare ejus est disponere.*

D E

D E

Termino S. Hillarii,

35 & 36 Car' II. 1683.

IN CURIA CANCELLARIÆ

Stephens versus Dr. Berry.

Case 209.

15 Januarii.

In Court
Lord Keeper.

The Chancellor's Court in Oxford hath not Jurisdiction of Matters of Freehold.

THE Plaintiff exhibits his Bill to be relieved touching some Lands in *Cornwall*, and the Defendant being Head of *Exeter* College in *Oxford*, pleads the Privilege of the University of *Oxford*, and that he ought to be Sued in the *Vice-Chancellor's* Court in *Oxford* only.

But his Plea was over-ruled; for that Matters of Freehold are excepted out of the Patent to the University, and their Court can at best have but a lame Jurisdiction, as to Lands in *Cornwall*.

Case 210.

Stapleton versus Sherrard.

Eodem die.

Bill to discover who is Tenant of the Freehold, in order to bring a *Formedon*, will not lye.

THE Bill sets forth that the Plaintiff was intituled to certain Lands, as Remainder Man in Tail, and prays a Discovery, who was the Tenant of the Freehold, that he might know against whom to bring his *Formedon*.

Vol. post Case
271.

To this the Defendant pleaded a *Fine* and *Non-claim* in Bar, and likewise demurred.

The

The *Lord Keeper* inclined that the Demurrer was good; for that one shall not have a Bill here in any Case to discover a Tenant to the *Præcipe*, for there are ways to know it without; tho' the Case of *Bickerton* and *Bickerton* was cited, where such a Demurrer was disallowed. But the Matter in the Principal Case went off upon the Plea, which was allowed to be good: For tho' after the Fine levied the Plaintiff had made his Entry, yet that would not do; the Fine being levied by Tenant in Tail, which made a discontinuance of the Estate, and therefore the Plaintiff must make his Claim by Action.

Entry of Re-
mainder Man,
within five
Years after a
Fine levied by
Tenant in
Tail will not
save his Right;
for the Fine be-
ing a Discon-
tinuance, he
ought to make
his Claim by
Action.

Afterwards the Matter of this Demurrer coming on to be argued again on the 5th of *February* following, the Demurrer was allowed to be good.

Brend versus Brend.

Case 211.

Eodem die.

UPON a Demurrer to a Bill of *Review*; the Case was thus. The Defendant had a Jointure in some Houses in *London* before the Fire, of 100 *l. per Ann.* The Houses are burnt down, and then the Wife and Husband borrow 1500 *l.* to build upon the Ground, and levy a Fine *sur concess.* for 99 Years, if the Wife lived so long, and a Deed is made between the Conusee and the Husband, wherein the Husband covenants to repay the Mortgage-money with Interest: And the Equity of Redemption is limited to the Husband and his Heirs, but the Wife is no Party to this Deed: The Husband expends 3 or 4000 *l.* in building upon this Ground, and dies; the Question was, whether the Jointress or the Heir of the Husband should redeem. The *Lord Chancellor Nottingham* had decreed it to the Wife, and now upon arguing the Demurrer, the *Lord Keeper* was of the same Opinion; for that the Wife was no Party to the Deed of Redemption, by which the Redemption was limited to the Husband; and the Wife being a Jointress, and having granted a Term for

2 Ch. Rep.
161.

A Man marries a Jointress of Houses, which are burnt down, and they borrow 1500 *l.* to rebuild, and levy a Fine *sur concess.* and by Deed between the Husband and Conusee the Equity of Redemption is reserved to the Husband and his Heirs; he lays out 3000 *l.* in Building, and dies.

Decreed the Wife and not the Heir to redeem.

I i i

Years

Years only out of her Estate for Life, there rests a Reversion in her, which naturally attracts the Redemption; and said, if the Cause had come originally before him, and there had been Assets sufficient, the Husband having Covenanted to pay this Mony, he would have decreed it clear to the Wife: It was as little as a Husband could reasonably do, to rebuild the Houses, and put his Wife's Jointure in as good Plight, as it was before: And therefore allowed the Demurrer to the Bill of Review.

See the next
Case.

In this Case a Debate arose touching the stating of the Matters of Fact in a Decree, and it was complained, that the *Registrars* now drew up Decrees in such a manner, as that no Bill of *Review* could be brought; for they only recite the Bill and Answer, and then add, that upon the reading of the Proofs, and hearing what was alledged on either Side, it was decreed so and so; and never mention what particular Facts were allowed by the Court to be sufficiently proved, and what not; that so upon a Bill of *Review* it might appear to the Court upon what Facts the Decree was grounded.

The *Lord Keeper* declared, he would not allow of that way of drawing up Decrees in general; but that the Facts that were proved, and allowed by the Court as proved, should be particularly so mentioned in the Decree; otherwise, if a Bill of *Review* was brought, those Facts should be taken as not proved. For else a Decree could never be reversed by a Bill of *Review*, but all erroneous Decrees must be reversed upon *Appeals*.

Bonham versus Newcomb.

Case 212.

25 Januarii.

In Court

Lord Keeper.

Ante Case 6.

Post Case 227.

THIS Case came now before the Court upon a Demurrer to a Bill of Review to reverse a Decree made in this Cause by the *Lord Chancellor Nottingham*: And the Error assigned was, that the Defendant *Newcomb* ought

ought not to be admitted to a Redemption against his Express Agreement in the Mortgage-deed to redeem within a certain Time, or otherwise that the Estate should be irredeemable.

It was argued for the Demurrer,

First, That an Estate could not be a Mortgage at one time, and afterwards become an absolute Purchase, by one and the same Deed.

Secondly, That the Mortgagee in this Case had a proper Remedy, and might have made his Estate absolute in a legal Course, *viz.* by exhibiting a Bill to foreclose the Mortgagor of the Equity of Redemption: and they cited the Case of *Yeildmington and Gardiner*, where the Mortgagor was to redeem during Life *only*, and yet his Heir admitted to the Redemption; and Sir *Robert Jason's* Case, where an Estate was to go to his Wife and her Heirs, unless a sufficient Jointure were settled within such a time limited in the Deed, and the Case of *Howard and Harris*.

*As to Case 31.
Ch. 19f.*

But as to that Case, it was answered, tho' there was a qualified Redemption, yet there was an Express Covenant for Repayment of the Mortgage-mony, and so it was in the Power of the Mortgagee to make it a Mortgage at any time.

But the *Lord Keeper* inclined to reverse the Decree, for that *modus & conventio vincunt legem*; and all Conditional Purchases or Bargains must not be turned into Mortgages: And said, that where there is a Condition or Covenant, that is good and binding in Law, Equity will not take it away.

It was objected against the Bill of Review, that they had assigned Errors collected from the Proofs in the

the Cause, that did not appear in the Body of the Decree.

See the last preceding Case

But the *Lord Keeper* observed, that was occasioned by the ill Way they had got of late in drawing up Decrees in general, without particularly stating the matters of Fact: And said the Plaintiff in a Bill of Review should not be concluded by it; unless the Matter of Fact were particularly stated in the Decree.

At last it was agreed by the Council to wave the signing and inrolling the Decree by Consent, and to hear the Cause again *de Integro*.

Civil versus Rich.

Case 213.

29 Januarii.

In Court.

Lord Keeper.

2 Ch. Rep. 160.

Real Estate

settled by a

Freeman of

London on a

Child no Bar

to the Orphanage

part, tho'

such Settlement

declared by the

Father to be a

full Advance-

ment.

Ante Case 176.

A Child ad-

vanced in Mar-

riage with a

Portion is bar-

red of the Orphanage

Part, unless the Cer-

tainty of such

Portion appears

by writing un-

der the Father's

hand.

Ante Case 78.

THE Custom of the City of *London* touching Orphans was certified to be; That where an Heir or Coheir had a real Estate settled on him by the Father, that the same was out of the Custom of the City of *London*; and tho' the Father should afterwards declare the same to be a full Advancement for such Child, yet that was no Bar to his Orphanage part, neither was it to be brought into *Hotch-pot*; but was clearly out of the Custom.

And it was said, that by the Custom of the City of *London*, where a Child is married with the Father's Consent, and there is a Portion given in Marriage, such Child is debarred from claiming any benefit of the Orphanage Part; unless the Father shall by writing under his Hand and Seal not only declare, that such Child was not fully advanced, but likewise mention in certain, how much the Portion given in Marriage did amount unto; that so it may appear what Sum is to be brought into *Hotch-pot*.

Jeffereys versus Small.

Cafe 214.

Eodem die.

In Court
Lord Keeper.

Two Persons
Occupy and
stock a Farm
jointly.

There shall be
no Survivor-
ship.

But if two take
a Lease jointly
of a Farm, the
Lease shall Sur-
vive.

Not necessary
in Articles of
Copartnership
to provide a-
gainst Survivor-
ship.

Where two
are jointly in-
terested by way
of Gift, Sur-
vivorship takes
place. Other-
wise in a joint
Undertaking in
the way of
Trade.

TWO Persons having jointly stock'd a Farm, and Occupied it as Joint-tenants, the Bill was to be re- liev'd against Survivorship, one of them being dead: And tho' it was proved in the Cause, that the deceased was in- formed, what the Consequence of Law was in Cafe he should dye, and that he thereupon replied, he was content the Stock should Survive; yet the Lord Keeper was clear of Opinion, that the Plaintiff ought to be relieved: and said, if the Farm had been taken jointly by them, and proved a good Bargain, there the Survivor should have had the benefit of it; but as to a Stock employed in way of Trade, that should in no case Survive. The Custom of Mer- chants, as to Bills of Exchange, is now extended to Inland Bills; and the Custom of Merchants, is extended to all Traders, to exclude Survivorship: and tho' it is common for Traders in Articles of Copartnership to provide against Survivorship; yet that is more than is necessary: and he said, he took the distinction to be, where two become Joint-tenants or jointly Interested in a thing by way of Gift or the like, there the same shall be subject to all the con- sequences of Law; but as to a joint Undertaking in the way of Trade or the like, it is otherwise: and decreed for the Plaintiff accordingly.

Domina Speake versus Domina Speake.

Cafe 215.

Eodem die.

In Court
Lord Keeper.

A Man cove-
nants, that
Lands settled
for a Jointure
are of such a
Yearly Value.

This relates
only to the time
of the Settle-
ment, and not
to the Death of
the Husband.

THE Bill was to have a Jointure, defective in Value, made good; the Husband having Covenanted, that the Lands settled for the Plaintiff's Jointure were 400 l. per Ann. whereas they were but 350 l.

The Defendant was decreed to perform the Covenant in *Specie*; but the Value of the Lands were to be Estimated,

K k k

as

as they were at the time of the Jointure settled, and not according to the present Value; Rents being now much fallen every where: but if the Covenant had been that they were of 400 *l. per Ann.* and should so continue, then they should have been made up full 400 *l. per Ann.* at this time.

Settlement for a Jointure is made in pursuance of Articles, and there is a Covenant in the Articles that the Lands are of such a Yearly Value, but it is omitted in the Settlement. This Covenant doth subsist.

It was Objected for the Defendant, that this Covenant for the Value was only in the first Articles, and not in the Jointure Deed; and that therefore the Articles being Executed, and this Settlement of a Jointure, wherein there is no Covenant as to the Value, accepted as a Performance of the Articles, the Plaintiff ought not now to resort back to the Covenant; and tho' this Settlement was made when the Plaintiff was an Infant and a Feme Covert, and so no Acceptance of hers could conclude her, yet it was accepted by her Father, with whom the Articles were made, and he transacted this whole Affair on her behalf. *Sed non allocatur.*

Hoby versus Hobby.

Case 216.

Eodem die.

In Court
Lord Keeper.

2 Ch. Rep. 160.
Equity will relieve against a fraudulent and partial Assignment of Dower by the Sheriff.

THE Bill was to be reliev'd against an Assignment of Dower by the Sheriff, which in the Bill was charged to be fraudulently done; there being assigned to the Defendant for her Dower, one full third part of the Lands, which amounted to 300 *l. per Ann.* and in this Third part there was a Cole-work, which One Year with another was worth 300 *l. per Ann.* beyond all Charges; and yet no Consideration was had of it in the Assignment of this Dower: and it likewise appeared, that the Defendant's own Father was the only Person that on the behalf of the Infants the Children defended the Writ of Dower, and appeared to see the same set out, which look'd like a Collusion: and the Plaintiff's Council offering, that the Defendant should have one Intire Third both of Land and Coal-works, and that by way of a Rentcharge on the whole,

the Court ordered, she should accept thereof; or that otherwise a new Assignment of Dower should be made: and she took time to consider of it.

Reeve versus Reeve.

Cafe 217.

5 Februarii.

In Court.
Lord Keeper.

THE Cafe was, Sir Richard Reeve having Issue by a former Venter, by Deed charges his Lands at *Bickerton* for the Payment of 3000*l.* Portion to his Daughter, and afterwards marries a second Wife, and makes her a Jointure of a Moiety of these Lands at *Bickerton*, without taking notice of this Charge of 3000*l.* He afterwards by his Will, thinking that this 3000*l.* charged as aforefaid would be good against the Jointure, takes notice thereof, and devises to his Wife other Lands in *Yorkshire* in lieu of her Jointure in *Bickerton*, and dies.

A. charges Land in D. with a Portion for a Daughter by a first Venter, and then marries, and settles part of these Lands for the Jointure of a second Wife, who has no Notice of the Charge. A. believing the Portion would take Place of the Jointure, by Will gives ~~the~~ Lands in *S. M.* lieu thereof. The Wife by combination with the Heir refuses to accept the Devise. Decreed the Daughter should hold the Lands in S. till her Portion was paid.

The Wife and the Son and Heir agree together to defeat the Daughter of her 3000*l.* Portion; and therefore the Wife finding that the Settlement, which was made on her Marriage, tho' subsequent in time, would yet prevail against this Charge of 3000*l.* which was voluntary and fraudulent as to her, she adheres to her Jointure, and refuses to accept of the Devise. The Daughter's Bill is to be relieved.

The *Lord Keeper* decreed, the Plaintiff should hold such Part of the Lands in *Yorkshire*, as should be equal in Value to such of the Lands in *Bickerton* as were comprised within the Jointure, until her Portion was raised.

Cresset versus Kettleby.

Cafe 218.

Eodem die.

In Court.
Lord Keeper.

THE Bill was that the Plaintiff's Father by Settlement on his first Marriage was only Tenant for Life, or else Tenant in special tail, and the Plaintiff was the eldest Son

When a Bill is in the Disjunctive, the Defendant by his Plea may take of it either way.

of that Marriage; and that the Defendant claimed by a subsequent Settlement, having notice of the first.

The Defendant pleaded a Fine levied by the Father, and set forth her Title under the second Settlement, and insisted she was a Purchaser, but did not plead she had no Notice of the first Settlement.

Lord Keeper, the Bill being in the disjunctive, the Defendant might take it either way; and having pleaded a Fine, which is a Bar, supposing the Father to be Tenant in Tail, allowed the Plea.

Earl of Newburg versus Wren.

Case 219.

Eodem die.

In Court.

Lord Keeper.

After a Bill brought in the Exchequer to foreclose, the Defendants may bring a Bill in this Court to redeem, and the Pendency of the former Suit is not pleadable.

THE Plaintiff's Bill was to foreclose the Defendant, and the Defendant pleaded, that he had already exhibited a Bill against the now Plaintiff in the *Exchequer* to redeem, to which Bill the Defendant there (the now Plaintiff) had answered; and the subject matter of that Suit being the same with the Plaintiff's Bill in this Court, the Defendant pleaded the Pendency and Priority of the former Suit in the *Exchequer*, in Bar to the Plaintiff's Bill here.

And for the Plea it was argued by the *Solicitor General* and others, that this Bill here was but in the nature of a *Cross* Bill to that in the *Exchequer*, which the now Plaintiff might have exhibited there, and then one Account of the Profits would have served for all, and it was vexatious in the Plaintiff to bring the same Matter in Issue in another Court at the same time: And if the *Deputy Remembrancer* in the *Exchequer* should take the Account one way, and a *Master* here should take it another, it would breed Confusion: and if this Court should be of an Opinion, that there ought to be no Redemption, and the *Exchequer* should decree a Redemption, the Jurisdictions would clash: And therefore to avoid these Inconveniences

niencies Priority of Suit ought to give Jurisdiction to the *Exchequer*.

But the Lord *Keeper* over-ruled the Plea, and said, this Court must deny Justice to none; and a Plaintiff has a Liberty to commence his Suit in what Court he thinks fit; and the *Chancery* was the *highest Court* of Equity: and tho' the *Exchequer* was an antient Court of Equity; yet the same was but a *private Court*, and its Jurisdiction properly was only for getting in the *King's Revenue*, and for the *King's Officers*; and they ought to keep within their proper bounds: and if there should happen any of the Inconveniencies mentioned by Mr. *Solicitor*, there are several Precedents, that Injunctions have gone to the *Exchequer* in such Cases.

Court of *Exchequer* a private Court, and it's proper Jurisdiction concerns only the *King's Revenue* and the *King's Officers*. This Court has sent Injunctions to the Court of *Exchequer*.

And the Plaintiff's Council urged the Case was much stronger, for the Defendant *Wrenn* had bought one *Doyly's* Title, and *Doyly's* Title was from one *Ball*, who had formerly exhibited his Bill to redeem in this Court, and upon hearing his Bill was dismiss'd; so that in truth this Court was first possessed of the Cause, and this Dismission was afterwards Pleaded in the *Exchequer*, and *Doyly* was privy to it, but the Court of *Exchequer* disallow'd the Plea.

Lord Keeper declared his Opinion to be, that in any Case if the Mortgagor exhibited a Bill to redeem in the *Exchequer*, that the Defendant there should be at Liberty to exhibit a Bill to foreclose in this Court: and over-ruled the Plea, and order'd the Defendant to pay Costs.

Sir Jo. Lowther versus Carill.

Case 220.
Eodem die.

THE Defendant having agreed to purchase a Lease of the Plaintiff, the Lease was drawn and some Alterations made in it by the Defendant's Council, and it was afterwards Ingrossed and sent down into the Country to the

In Court
Lord Keeper.
A agrees by parol with *B* for a Lease which is drawn, and then perused

and corrected
by A's Council,
and afterwards
Ingrossed and
executed by B.
Whether this
is within the
the Statute of
Frauds as to A.

the Plaintiff to be executed, who accordingly executed the same: But the Lease not being return'd within the time agreed on, but kept in the Country *three* Months longer than it ought to have been, and the Defendant upon enquiry finding she was to pay too much for this Lease, when the Deed was returned, she refus'd to accept it, or to Execute a Counter part. The Plaintiff's Bill was to compell her to it.

The Defendant Pleaded in Bar the Act of *Frauds* and *Perjuries*, and that she had not sign'd any Agreement in Writing.

And for the Defendant it was strongly insisted, that by the Letter and Meaning of the Act of Parliament the Defendant ought not to be bound by this Agreement, she or her Agent having not sign'd the same; and tho' Sir *Jo. Lowther* had executed the Lease on his Part, yet the Defendant ought not to be bound, the Words of the Act being that the Agreement must be sign'd by the Party that is to be bound by it.

Lord Keeper order'd the Defendant to Answer, and to save the benefit of the Plea to the hearing.

Hayward versus Angell.

Case 221.

6 Februar.

In Court

Lord Keeper.

Portions given
by Will to three
Daughters, upon
Condition they
released certain
Lands to the
Heir; one dies
without Re-
leasing.

Whether the
Portions of the
other Daughters
shall be paid.

UPON a Demurrer to a Bill of Review upon a Decree made by the Lord Chancellor Nottingham, the Error assigned was, That the Defendant's Wife's Father having given Portions to his Daughters, in case they should release to his Heir their Right to certain Lands, one of the Daughters happened to dye before she had given any such Release, and therefore the Heir refus'd to pay the Portions; and thereupon the other Daughters having exhibited their Bill to be reliev'd, they were dismissed; whereas the Portion was *two thousand* Pounds to each Daughter,

Daughter, and the Land to be Releas'd was not worth 500*l.* and the Performance of the Condition was prevented by the Act of *God*.

For the Demurrer it was argu'd, that this was a Condition precedent, and being not performed there could be no Relief; and cited *Fry* and *Porter's Case*, and that this Case was much stronger than that; for the Words are, *if his Daughters should Release then he appointed them such and such Portions upon Condition they should Release, &c.* so that the Condition was double; and is as full as can possibly be Penn'd, to exclude the Daughters from all benefit of their Portions, unless they should Release: and Serjeant *Maynard* would have it to be stronger than an Ordinary Condition Precedent, it being, If they should Release then he gave &c. and said, there was a difference between a Condition in the giving a Portion, and a Portion given upon Condition; for in the former Case the Portion does never arise unless the Condition is performed.

But the Lord *Keeper* inclin'd to over-rule the Demurrer: and said, in all Cases where the Matter lies in Compensation, be the Condition precedent or subsequent, he thought there ought to be Relief. And by Agreement the signing and inrolling the Decree was set aside, and the Cause to be heard *de Integro*.

Sir James Johnson versus Desmineere.

THE Plaintiff's Bill was an Appeal from a Decree of the Court of *Policies* and *Affurances* in *London*; whereby the Defendant below not appearing upon the first Summons, the Bill was ordered to be taken *pro confesso* against him: and for the Plaintiff it was insisted, that tho' by the Stat. 43 *Eliz. cap. 12.* and the Statute 14 *Car. 2. cap. 23.* the Commissioners may proceed in a summary Course without formalities of Pleadings, yet it was very

Case 222.

9 Februar.

In Court
Lord Keeper.

Decree of the Court of *Policies* and *Affurances* in *London* reversed, because the Bill there was taken *pro Confesso* after the first Summons.

ex-

extraordinary to take a Bill *pro confesso* upon the first Summons; and they ought at least to have had the Allegations in the Bill proved, before they proceeded to make such Order: And it was said, tho' the Course in this Court now is ^{not} to take a Bill *pro confesso* after the Party has once appeared and stands out in Contempt, till the Plaintiff is got to the end of the line, and has run through all the Process of the Court against him; yet formerly this Court did not do it, even in that Case, without putting the Plaintiff to prove the Substance of his Bill.

Whereupon the *Lord Keeper* reversed the Decree: And tho' in this Case the Appeal was not brought within two Months after the Decree, according to the said Act of the 43 *Eliz.* yet in regard the Defendant could not make out, that the now Plaintiff had been fairly Summoned, the *Lord Keeper* admitted the Appeal; and thereupon the Parties agreed to try the Matter in an Action on the Case, the Plaintiff by Order being not to insist upon the Statute of Limitations.

Attorney General versus Syderfen.

Case 223.

11 Februarii.
In Court
Lord Keeper.

Devise of
1000*l.* for such
Charity as Te-
stator had by
Writing ap-
pointed, and no
such Writing
being to be
found, the King
appointed the
Charity, and the
same was de-
creed accord-
ingly.

MR. *Syderfen*, the Defendant's Brother, having by his Will (amongst other things) charged a Manor in the *West* of England with the raising 1000*l.* out of the Profits, *to be applyed to such charitable Use as he had by Writing under his Hand formerly directed*, and no such Writing being to be found; and the Defendant his Brother and Heir at Law being in Possession of the Estate; the Bill was brought in the Name of the *Attorney General* at the Relation of the *Governours* of *Christ's Hospital*, setting forth the Will, and that no such Writing as was mentioned therein was now to be found, and that therefore the Application of this Charity was in the *King*, and charging that the Testator in his Life-time had frequently expressed his good Intentions towards this *Hospital*; and that the

King

King being informed that there was no such Writing to be found as aforesaid, had been graciously pleased to declare his Will and Pleasure to be, that this Mony should be laid out for the Benefit of the *Mathematical* Boys, which were of his own Foundation in *Christ's Hospital*; and it was therefore prayed, that the same might be so applied.

The Defendant by Answer confessed the Will, but that the Writing therein referred unto was not to be found; and that he believed if any such Writing was at any time made by the Testator, it was afterwards by him revoked and cancelled; for that subsequent to the making of this Will, he had charged several great Sums of Mony upon his Land, and that the whole Estate would scarce amount to answer all the Charges thereon, and the Heir would be disinherited and left without any Provision.

Lord Keeper, It is no Question but the Charity being now general and indefinite, (this Writing not being to be found) the Application of this Mony is now in the *King*; and his Majesty having declared his Pleasure to have it disposed for the Benefit of the *Mathematical* Boys of his Foundation in *Christ's Hospital*, he thought it could not be better laid out: And tho' by the Will it was directed to be raised out of the Profits, yet it being a gross Sum, he thought it would carry Interest to the time it should be paid, and raised out of the Profits: And for as much as by the Will it was intended to be a Permanent Charity, he referred it to a Master, who by the Approbation of Mr. *Attorney General* should see it laid out in Land for the Benefit of the said *Mathematical* Boys, and decreed the same accordingly. And cited the Case of *Frier* versus *Peacock* in this Court; where *Fryer* the Testator had given several particular Charities by his Will, and devised the Surplus for the good of Poor People for ever; and a Bill being brought, that the Surplus which was devised indefinitely, might be applied for the Benefit of *Christ's Hospital* by the *King's* Direction, it was so decreed; altho' there were poor

A Devise for the good of poor People.
The Devise being indefinite, the King may appoint the Charity.

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Kindred

Kindred of the Testator's, who insisted, they were within the Equity of that general Devise to a Charity.

Note, In this Case the Defendant by the Decree was to be indemnified against the Writing referred unto in the Bill, in case it should be afterwards found.

Basket versus Peirce.

Case 224.

Eodem die.

In Court
Lord Keeper.

Cestuy que trust
in Tail with
Remainder
over levies a
Fine and dies
without Issue,
and there are
five Years *Non-claim*.

By Opinion
of Lord Keeper
Remainder
Man barred.

A Man by his Will devises his Lands to Trustees for 99 Years, for the Payment of his Debts and Legacies, and afterwards in case they should not act and take upon them the Trust within Six Months after his Death, then he devised the said Lands to another and his Heirs in Trust to pay his Debts and Legacies, and afterwards to A in Tail, Remainder in Tail to B. A levies a Fine, and dyes without Issue. Five Years pass and *Non-claim*.

The Question was, whether this Fine by *Cestuy que trust* in Tail, and *Non-claim*, should bar the Remainder Man in Tail? And the Lord Keeper was of Opinion, that it should: For equitable Rights are as well to be bound by *Fines*, as Actions and Titles at Law; and cited the Case of *Freeman* and *Barnes*, where a Fine by *Cestuy que trust* was adjudged a good Fine and Barr; and he was of Opinion, that it would bind at Law.

But it being urged for the Plaintiff, that in the Case of *Freeman* and *Barnes*, there the Fine was levied by the *Cestuy que trust* that had the whole entire Estate in him, and so was to work upon his own Equity only; but here the *Cestuy que trust* had but an Estate Tail only, which was spent, and there were other Remainders over: And they did insist in this Case, that the Remainder Man was not barred by *Non-claim*; for that all the Debts and Legacies were not paid, and so his Title was not commenced; and the Term for 99 Years did subsist, and was not expired; and

and it was insisted, that the entire Estate at Law being in the Trustee, he ought to have entred, and it was against Equity to suffer the *Cestui que trust* to be barred by Non-claim for the Laches of his Trustee.

Whereupon the *Lord Keeper* decreed the Trustee should give leave to the Plaintiff to bring an Action in his Name to try his Title; and said it being a Title at Law, he would not determine it himself; tho' his Opinion was, that the Plaintiff was barred.

Phillips versus Duke of Bucks.

Case 225.

Eodem die.

In Court.

Lord Keeper.

THE Case was; that Mr. *Phillips* having formerly treated with the *Duke of Bucks* for the Purchase of the Manors of *Sheepshhead* and *Garrowden* in the County of *Leicester*, and not agreeing upon the Price, the Treary broke off: But to compass this Purchase Mr. *Phillips* procured Mr. *Niccoll*, the *Lord Chancellor Nottingham's* Secretary, to negotiate this Matter for him; and it being pretended to the *Duke* (as was proved in this Cause) that this Purchase was for the *Lord Chancellor*, or for the *Solicitor General* his Son, the *Duke* declared himself willing to oblige any of that Family; and said, if the *Lord Chancellor* would please any way to satisfy himself of the Value of the Estate, he should set his own Price. Afterwards Mr. *Niccoll* agreed with *Hemmings*, a Land Jobber, whom the *Duke* had employed in this Affair, to buy this Estate for 28000*l.* And thereupon the *Duke* and Mr. *Niccoll* entered into Articles, whereby the *Duke* did mention to grant, bargain and sell this Estate to *Niccoll* and his Heirs in the Present Tenfe: and *Niccoll* covenants to pay 28000*l.* for this Purchase, at such times as were therein mentioned; and both of them sealing each part of the Indenture, they were both Originals: and *Niccoll* goes immediately, and

A articles for the Purchase of B's Estate, pretending he bought it for one, whom B was desirous to oblige, but in truth bought it for another, and by that means got the Estate at an Under-Value. Equity will not decree an Execution of these Articles.

acknowledges before a *Master* in *Chancery* the Deed in his Custody, and gets it inrolled.

The *Duke* afterwards discovering this Purchase was in trust for Mr. *Phillips*, looks on himself as ill used in this matter, and refuses to perform the Articles, or to execute Conveyances: But one Article being, that it should be lawful for the Purchaser to sue in the *Duke's* Name to compel his Trustees to convey and his Mortgagees to assign to Mr. *Niccoll*, *Phillips* and *Niccoll* exhibit a Bill and make the *Duke* a party Plaintiff against the Trustees and Mortgagee, setting forth the Articles, and that the Purchase was in trust for *Phillips*, and praying the Defendants might convey and assign to the Plaintiff *Phillips*.

Afterwards the *Duke* upon a Motion, affirming that the Bill was exhibited in his Name without his Privy or Consent, gets his Name struck out of the Bill: Then Mr. *Phillips* amends his Bill, and makes the *Duke* a Defendant, and as against him prays an execution of the Articles in *Specie*. The Trustees and Mortgagees answer. But the *Duke* stands out to a Sequestration; and then the Plaintiffs go on against the Trustees and Mortgages without the *Duke*, and obtain a Decree against them to convey and assign, which the Mortgagees afterwards on Payment of their Money did accordingly.

One of the Defendants is in contempt, and stands out to a Sequestration, and the Cause is heard against the other Defendants; yet he may come in and answer, and the Cause may be heard again as to him.

Afterwards the *Duke* comes in and answers, and examines his Witnesses, and the Cause coming on this day regularly to be heard as against him; and the matters aforesaid being made out by proof, and likewise (tho' but slenderly proved) that the Lands were of greater Value, and were worth between 35 and 36 thousand Pounds,

The *Lord Keeper* declared his Opinion, that there had not been fair and open dealing in the managing of this Affair; but that the *Duke* appeared to him to have been misinformed and drawn in: And that the *Duke*, having a great

great Value for the *Lord Chancellor* or *Mr. Solicitor*, declared himself willing to part with the Estate to either of them for less than he would have done to another: and that being the Intention of the Agreement, *Lord Keeper* said, he would not in Equity carry it into execution for the benefit of a Stranger: and said, Articles, out of which an Equity could be raised for a Decree in *Specie*, ought to be obtained with all imaginable fairness, and without any mixture tending to Surprise or Circumvention: and therefore declar'd, he could not in Justice decree these Articles to be performed in *Specie*; but propos'd that if the Parties would agree to go before a Master; and if a better Purchaser did not come in within six Months, *Mr. Phillips* might retain his Purchase; but that Proposition was disliked on each side. The Duke desir'd the Opinion of the Court, and *Mr. Phillips* thought he had a good Cause at Law on his Deed Inrolled; but offerr'd to submit the Matter to the *Lord Keeper* as an Arbitrator: But that was declin'd by the *Duke*; he understanding the Court was of Opinion for him: And thereupon the *Lord Keeper* pronounced his Decree for dismissing the Plaintiff's Bill: and put this Case, that if a Man, being about to sell an Estate, should be informed by *J. S.* that the Vendor's Brother desir'd to be the Purchaser, and thereupon the Vendor should declare his Brother should have a better Penny-worth than another Person; and he should Article with *J. S.* for the Sale of it at an under value; and this Purchase should be in truth for a Stranger; *Lord Keeper* thought, that Equity ought not to decree this Purchase: and said, that *Mr. Phillips* had here a Person of great Honour to deal with, and ought to have carry'd the Matter fair and open with him; but declar'd, if the Bill had been brought in *Mr. Solicitor's name*, and he would have patronized the Purchase, the Articles must have been decreed, and no one can doubt, but he might have sold it to *Mr. Phillips* the next Day: but it was another Case, that was now before him.

Equity will
Decree an execution of Articles, unless obtained fairly, and without Surprise or Circumvention.

A Co-Plaintiff, tho' but a Trustee, cannot be examined as a Witness for the other Plaintiff.

Note, In this Case Mr. Niccoll was Mr. Phillips's principal Witness to have prov'd the fairness of the Contract and Proceeding touching this Purchase; but he being a party Plaintiff (tho' Mr. Phillips had an Order to examine him *de bene esse*) could not be read, but must have been dismissed before he could have become a Witness: But if Mr. Phillips had made him a Defendant to his Bill, as he might have done (and then the Trust had been upon Oath, whereas it was now only alledged in the Bill) then Mr. Niccoll disclaiming all Interest upon Oath, might have been a good Witness.

Note, Mr. Phillips had not proved the Value of the Land, as he ought to have done, but would have examined Witnesses *viva voce* to it, but that would not be received.

Note, Tho' the Articles were Inrolled, and imported a present Grant, the legal Estate did not thereby pass to Niccoll, it being in the Mortgagees.

Case 226.

1 Martii.

In Court
Lord Keeper.

Charitable Legacies by the Civil Law are to be preferred to other Legacies.

Feilding versus Bond.

A Man by his Will having devised several Legacies, and amongst others, 40*l.* to a Charity; and the Spiritual Court being of Opinion that tho' the Estate fell short, and would not satisfy all the Legacies, yet that the entire 40*l.* ought to be paid to the Charity in the first place, and not in Average or Proportion with the other Legacies, the Plaintiff exhibited his Bill, setting forth that the Estate was deficient and would not satisfy all the Legacies, and that the Spiritual Court notwithstanding would compel the Plaintiff to pay this 40*l.* for the Charity, without having any Security to refund.

If the Spiritual Court gives a preference to Charitable Le-

And the Plaintiff for that reason now mov'd for an Injunction to the Spiritual Court: but it was deny'd by the Lord

Lord Keeper, who said the Civil Law was the Law by which Legatory matters were to be determined, and that the Spiritual Court had unquestionably the Proper Jurisdiction thereof; and if by their Law there was a Preference given to Charitable Legacies, he had no Power to alter the Law in that Point; and therefore refused to grant any Injunction, or to direct Security to be given for refunding in case of deficiency of Assets.

gacies, in case of Deficiency of Assets, this Court will not grant an Injunction!

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Termino Paschæ,

36 Car' II. 1684.

In CURIA CANCELLARIÆ.

Bonham versus Newcomb.

Case 227.

In Court
Lord Keeper.

Ante Case 6 &
212.

THIS Cause coming on to be heard *de Intèrro* before the Lord Keeper, he adhered to his former Opinion; that there ought to be no Redemption in this Case: and Principally, because it was proved in the Cause, that the Intent and Design of the Mortgagor was to make a Settlement by this Mortgage, and that he intended a Kindness and Benefit to the Mortgagee, in case he should not think fit to redeem this Estate in his Life-time; and that there being an express Covenant that the Mortgagor might redeem at any time during his Life, he thought he could not in Equity have been debarr'd of that Privilege: for by a Bill to foreclose a Man, you shall only bar him of his equitable Title, when the Estate in Law is become forfeited: but where he has a continuing title at Law, as in this Case an express *Proviso*, that he might redeem at any time during Life, he thought Equity could not debar him of that Privilege: and therefore being the Mortgagee in the present Case could not have compelled the Mortgagor to redeem, and he might have liv'd so long, as to have made it an ill bargain; and now, when by a Contingency it happens to be a good Bargain, there is no reason to raise

raife an Equity from thence to take the Estate from the Mortgagee; especially in this Cafe there being a Kindness and Benefit intended him by the Mortgagor: and therefore reversed the Lord *Nottingham's* Decree, and dismissed the Original Bill for a Redemption.

Bricker versus Whalley.

Cafe 228.

30 Aprilis.

In Court.
Lord Keeper.

A Man by his Will, after Debts and Legacies paid, gives all the Residue and Surplus of his Estate to *A*, *B*, and *C* and the Wife of *C*, equally to be divided amongst them, share and share alike.

Legacies given to *A*, *B*, and *C* and the Wife of *C*, equally to be divided amongst them. *C* and his Wife shall have but one third.

The only Question was, whether *C* and his Wife should be taken as one Person, and so have only One third part of the Surplus; or should be taken as two Persons, and so be intitled to a Moiety.

It was urged, that by the Words, *equally to be divided betwixt them*, they took as Tenants in Common, and not as Joint-tenants; and therefore must take as two Persons; and that in this Cafe there should be no Survivorship; but if the Husband dyed his Share should go to his Executor, and not to his Wife: and by Mr. *Solicitor General*, if Lands had been devised in like manner, the Husband and Wife should take by Moieties, and as distinct Persons.

But it being proved in the Cause, that the Wife was only of Kin to the Testator, and not the Husband, the Lord *Keeper* was of Opinion, that the Husband and Wife should have but one third part; and the rather for that he observ'd the two (*Ands*) in this Devise, *viz* to *A*, *B*, and *C* and *W* his Wife: and tho' a Man may devise to ten Persons, and add an (*And*) betwixt every Person's name, yet it is not natural or usual to add an (*And*) till you come to the last Person.

Littleton Sect.
291.

Cafe 229.

Eodem die.

In Court
Lord Keeper.An Estate by
Occupancy not
subject to
Debts before
the Statute of
Frauds.*Ragget versus Clerke.*

THE Bill was brought by an Executrix to be relieved against an *Occupancy*, and to subject the Estate to the Payment of Debts, pretending a deficiency of Assets.

It was said for the Defendant, that it was not proved in the Cause, that there was any deficiency of Assets, but if it had, yet this *Occupancy* happening before the Statute of *Frauds* and *Perjuries*, the Estate was no wise subjected to the Payment of Debts: And of that Opinion was the *Lord Keeper*, and therefore dismissed the Bill: And he cited a Cafe in the *C. B.* in the time of the *Lord Keeper Bridgman*, where the Question was between an under Lessee for Years, and a Tenant at Will, which of them should be the Occupant; and it was adjudged for the Tenant at Will, against the Opinion of the *Lord Keeper Bridgman*.

Cafe 230.

6 Aprilis.

In Court
Lord Keeper.Contingent
Limitation of
a Term for
Years adjudged
to be good, the
Contingency
being to hap-
pen within the
Space of 21
Years.Settlement of
a Term on a
Marriage in
Trust for the
Husband for
Life, Remain-
der to the first
Son until 21,
and after the
first Son come
to 21, then to
such first Son
for the remain-
der of the Term.*Massenburgh versus Ash.*

THE Cafe arose upon a Deed, touching the contingent Remainder of a term for Years: and tho' there was a Will in the Cafe, wherein there was a disposition of the same Term; yet it was agreed the Will could not alter the Deed, but that the Cafe must depend on the Deed alone: And as to that the Cafe was thus. A Term for Years was assigned to Trustees in Trust for *Baron* and *Feme* during their Lives, and the Life of the longer Liver of them; and if there should happen to be Issue Male of their Bodies living at the time of the decease of the Survivor of them, then in Trust, that the eldest Son of that Marriage should be maintained out of the Rents and Profits, until he attained his Age of 21 Years, and then the whole Term to be assigned unto him; and in case he should die before the Age of 21 Years, then in like manner for the

Main-

Maintenance of the second, third, fourth, and every other Son of that Marriage, one after another, till one of them should attain the Age of 21 Years, and then the whole Term to be assigned to him: But in case there should be no such Issue living at the time of the decease of the Survivor of the said *Baron* and *Feme*; or in case there should be such Issue, and they should all die before any one of them attained their Age of 21 Years, then he limited the Term to the Plaintiff Sir *William Massenburgh* that was his eldest Son and Heir by a former Venter. *Baron* and *Feme* die, and leave a Son only, who dies whilst an Infant of about 5 Years old.

But if the first Son dye before 21, then to the second and every other Son in the same manner; and if no such Son, or if all the Sons dye before 21, then to *J. S.* A good Limitation.

The Question was, whether the Remainder over to Sir *William Massenburgh* was good?

In the arguing of this Case it was agreed by the Council, and so declared by the Court, that as to the Limitation of the Trust of a Term, it was to be governed and guided by the same Rules in Equity, that the Devise of a Term is at Law, and not to be carried further; and that such Limitations or contingent Remainders as were good in one Case, would be so in the other. *Et è converso*.

Secondly, That the general Rule that has hitherto obtained was, that you might limit a Term to as many Persons as you would, one after another, that were *in esse* at the time of the Limitation; and one Step further, to a Person not *in esse*: But that there could be but one contingent Remainder of a Term for Years.

But the Council for the Plaintiff argued, that where there is a contingent Remainder limited upon a contingent Remainder, if the first Contingency never happens, then the second Contingency is good, and shall take place in Law: And insisted much on the Inconveniencies that People lie under, whose Estates consist in Church Leases, by reason they have no Latitude left by some hard Resolutions to make

make a Settlement of their Estates, or reasonable Provision for their Families. That these Inconveniencies were formerly so far considered in this Court, that in such Cases they would admit Limitations over, which the common Law would not then allow; but seeing it done in *Chancery*, the *Common Law* Courts soon followed the Example of this Court; and enlarged much upon the Inconveniencies that might often happen, should this Remainder be adjudged void: And observed that here was no danger of a Perpetuity; being the Contingency must of necessity happen within the Space of 21 Years at most after the decease of either the *Baron* or *Feme*: And this Case cannot be said to come nearer a Perpetuity than almost every Settlement of a real Estate; for here, if the Issue once attains his full Age, then the whole Term is to be assigned unto him, and he may dispose of it at his Pleasure, or otherwise it shall go in a Course of Administration. And they relied strongly on *Wood* and *Sanders's* Case, as a Case adjudged in Point: and cited the Cases of *Cotton* and *Heath*, and *Oakes* and *Chalfont*, &c.

Ro. 1. Abr.
612. Sect. 3.

On the other Side, the Defendant's Council insisted much on that Rule in cases of Executory Devises, that one contingent Remainder was good, but a Contingency upon a Contingency is not to be allowed: and to the Case of *Wood* and *Saunders*, they opposed the Case of *Child* and *Baily*, and cited the Cases of *Gooring* and *Bickerstaffe*, and of *Gibbons* and *Summers* in the *Common Pleas*, and the Case of *Warman* and *Seaman* in this Court. And urged, that in case that Rule were to be broken, which allows only one contingent Remainder, there are no Bounds set; and no Man knows where it will end; for as they may appoint the Contingency to happen within the Space of 21 Years, so they may enlarge it to 30 Years, and from thence to 40; and so on without end.

2 Cr. 459.

Lord Keeper thought it a Case of great Consequence; and for as much as he took the Rules in *Chancery* touching the

the Limitations of Trusts of Terms for Years, to be the same with executory Devises of Terms for Years at Law, he would have the Opinion of the Judges before he would determine any thing in this matter, and directed a Case should be drawn, as the Case stood upon the Deed, and that it should be tried in a fined Issue in the Common Pleas.

Vid. Post Case
250.

Vere Essex Earl of Ardglass, Plaintiff.

Henry Muschamp,

Defendant.

Case 231.

22 Aprilis.

Lord Keeper.

THOMAS Earl of *Ardglass* for 300*l.* in the Year 1675 did grant to the Defendant a Rent-charge of 300*l. per Ann.* out of Lands in *Ireland* of 1000*l.* a Year. To hold to the Defendant and his Heirs, and to commence from the *First Michaelmas* or *Lady-day* after the Earl's Death without Issue Male; with a Proviso, that if the Earl had any Issue Male who should attain the Age of *Twenty one* Years, the Grant should be void. Afterwards the Earl settled his Estate for 300*l.* consideration, to the Use of himself for Life, Remainder in tail to all his Issue Male, the Remainder in tail to the Plaintiff his Uncle, which was according to a former Settlement made by the Ancestors of his Family, and which Earl *Thomas* upon his Marriage had barred; and then the Plaintiff and Earl *Thomas* both brought their Bill to be relieved against the Grant of the Rent-charge, alledging that it was obtained by Fraud and Practice, by debauching Earl *Thomas* with Drink and Women, and that the Grant was pretended to be only a Security for Repayment of the Mony and Interest: After which Bill brought, the Defendant obtained a Release of that Suit from Earl *Thomas*, and the now Earl's Bill was (Earl *Thomas* being dead) to set aside the Grant and Release upon Payment of 300*l.* with Interest: and upon the first hearing of this Cause before the *Lord Keeper*, tho' he declared there was a foul Practice, yet he doubted it might be too great a Violation upon Contracts, to set it aside; therefore advised the Plaintiff to amend the Bill.

Grant of a Rent charge in Fee after a dying without Issue Male set aside for Fraud.

Vid. ante Case
70. & 125.

P p p

The

Contingency
of no Avail in
case of a frau-
dulent Bargain.

The Plaintiff afterwards obtained a Rehearing; and many Precedents in the Lord *Elsmere's*, Lord *Bacon's* and Lord *Covenstry's* times, and since, were produced, whereby it appeared, that unconscionable Bargains, which had been made with young Heirs, had been set aside by Decree of this Court; and it appeared in this Case, that at the time of the Bargain the Earl was very young, and had forsaken his Wife and her Friends in *Ireland*, and lived here in *London* in Riot and Debauchery, and for supply of his Expences had made this Bargain, without the Advice of any Friends or Council of his own; but relied wholly on the Defendant; and that the Consideration was but one Year's Purchase for a Rent-charge in Fee, now fallen into Possession, and that the Contingency of the Earl's dying without Issue Male (upon which the Defendant did insist chiefly for his Defence) was an Artifice of the Defendant's (the Earl, as appeared in proof, being disabled to get Children) and however that Contingency might be used as an Argument to persuade the Earl, that he had the best of the Bargain, yet the *Lord Keeper* did not think it likely the Defendant would have made it, but in Expectation of an unreasonable Advantage, and that the Earl would in a short time by his vicious debauched Course of Life destroy himself, (as he did;) and it appeared also, that the Defendant was informed by the Earl's Surgeon, that the Earl was not able to get a Child, and therefore the Contingency was not to be looked upon, as if the Earl had been in ordinary Circumstances; but as it was in the Eye of the Defendant, who was his Companion in those Debaucheries: and it appeared also, that the Defendant was solicitous to draw the Earl into the like Bargains with other People, and that the Release was obtained without any consideration, after the Settlement on the Plaintiff.

Whereupon (tho' for the Defendant it was insisted that it was a just Bargain, in regard of the Contingency, nor had the Defendant any Means to recover his Money again, and that the Bargain was made when the Earl was in good Health, and was acknowledged three Months after in order

to

to be inrolled, and that there was no Fraud in obtaining the Grant or Release) The *Lord Keeper* declared, that the more he heard of the Cause, the worse he liked it, and that the Earl of *Ardglasse* being easie, dissolute and necessitous, the Defendant in conjunction with his Cousin *Deny Muschamp*, who had got another unreasonable Bargain from the Earl, which had been set aside by this Court, had beset the Earl, and having got a Copy of the Settlement, from *Muschamp*, who had the Original, concealed both from the Earl: and that the Precedents produced came up to the Case, as he thought; And therefore, after some days Consideration had, He decreed a Reconveyance or Release of the Rent-charge, and that the same should be set aside, and a perpetual Injunction awarded, upon the Plaintiff's paying the Defendant 300 *l.* and Interest.

And the Defendant obtaining a Rehearing afterwards, the *Lord Keeper* upon the Rehearing declared, he was fully satisfied in the Decree, and that if he were to die presently, he would make it; and so confirmed it.

About a Year afterwards, a Bill was brought by the Plaintiff against *George Pitt Esq;* (who by the Agency of the Defendant *Muschamp* had obtained, for 300 *l.* consideration, the like Grant from the Earl of a Rent-charge of 300 *l. per Ann.* drawn exactly *mutatis mutandis* by *Muschamp's* Grant,) to be relieved against that Grant to *Pitt*, tho' Mr. *Pitt* insisted he did not transact that affair with the Earl himself, but being told by *Muschamp*, that such a Bargain might be had, left it to him to deal therein between them; and pretended utter Ignorance of the Earl's State of Life or Condition of Health, when the Bargain was made, so that he was innocent, and a fair Purchaser; which Pretence being foreseen, It was charged by the Bill particularly, that *Pitt's* Method in carrying on the Contract by *Muschamp* was a further Instance of the Fraud, that so, if he were questioned, he might deny his Knowledge of the Condition of the *Earl*; and tho' indeed the matter of the

Earl of Ardglass versus *Pitt*.
1685 or 1686.

*Fraus est celare
Fraudem.*

the Defendant's Ignorance of the Earl's Condition was all he had to insist on for his defence, more than what *Muschamp* had in his Case, yet the Lord Chancellor *Jeffereys*, upon the hearing of this Cause, in as much as it appeared that *Muschamp* had been Mr. *Pitt*'s Broker in other unreasonable Bargains, declared that it was not to be believed that Mr. *Pitt* would make this Bargain without inquiry, and knowledge of the Condition of the Man he dealt with; and that therefore Mr. *Pitt*'s Pretence of not personally knowing the Earl, or not treating with him, was not only a further Evidence of the Fraud; but that he was conscious, he should be questioned, and pretended that Ignorance, the better to excuse it; and declared *Fraus est celare fraudem*. And decreed *Pitt* to release and reconvey upon Payment of his 300 l. and Interest, and a Perpetual Injunction.

Case 232.

Goman versus Salisbury.

7 Maij.
In Court
Lord Keeper.
Agreement
in Writing may
be discharged
by Parol.

THE single Point of this Case was, Whether an Agreement in Writing made since the Statute of *Frauds* and *Perjuries* might be discharged by *Parol*? And Lord *Keeper* held it might. And therefore dismissed the Bill, which was brought to have the Agreement executed in *Specie*.

Telverton Peyton and his Wife, Sir *John Roberts* and *Nathaniel Denham*, Plaintiffs.

Case 233.

9 Maij.
In Court
Lord Keeper.

William Bladwell, Heir and Executor of Sir *John Bladwell*, & al'. Defendants.

Underhand Agreement to defeat an Agreement made on Marriage set aside as fraudulent.

SIR *John Bladwell* being Executor of Plaintiff *Peyton*'s Mother, and having purchased an Estate which belonged to Plaintiff's Mother, he promised that he would not only settle the said Estate on Plaintiff, but also other Lands of 300 l. a Year, if a convenient Match could be found for the Plaintiff. Accordingly in 1676, Sir *John* treated a Marriage for him with the Neice of the Plaintiffs, Sir

John Roberts and *Denham*, and it was agreed betwixt him and Sir *John Roberts*, that Sir *John* should give his Neice 2500*l.* Portion, to be laid out in Lands after his Death, and that *Bladwell* should settle Lands of the Value of 300*l.* a Year, (whereof 200*l.* per Ann. should be settled for the Jointure) and that he would also settle other Lands of the Value of 100*l.* per Ann. on himself for Life, remainder to Plaintiff *Yelverton Peyton* and his Heirs.

Accordingly by Lease and Release, 14 and 15 July 1676, Sir *John Bladwell*, in consideration of a Bond entered into by Sir *John Roberts* to pay 2500*l.* after his and his Wife's Death for the Marriage Portion, conveyed Lands in the County of *Norfolk* which in the Conveyance were said to be 300*l.* a Year. And as to 200*l.* a Year thereof, the same were limitted for the Jointure of the Wife of Plaintiff *Peyton*, Remainder to the Heirs Males of their two Bodies, Remainder to *Peyton* in tail, Remainder to him in Fee. And as to the Residue to Plaintiff *Peyton* in tail, Remainder to him in Fee. And Sir *John Bladwell* thereby covenanted, that the Jointure Lands were 200*l.* a Year; and that within two Years then next, he would settle other Lands in *Norfolk* of 100*l.* a Year, and worth 1700*l.* to be sold, to the use of himself for Life, Remainder to Plaintiff *Peyton* and his Heirs.

After the Marriage, Sir *John Bladwell* prevailed on Plaintiff *Peyton*, who was very young, on Promises of leaving him a greater Estate by his Will, than he had agreed to settle upon him, and by other Insinuations, to execute a Writing, whereby Sir *John Bladwell* was to receive the Profits of the whole Estate, allowing the Plaintiff *Peyton* only 120*l.* a Year, and to assign over to him Plaintiff *Robert's* Bond, and also to release or discharge the Agreement for the settling the 100*l.* per Ann. on him and his Heirs after the Death of *Bladwell*.

The Plaintiffs Bill was to be relieved against these Agreements, which had been extorted from the Plaintiff *Peyton*, and to have the Jointure made good, the Lands settled for the Jointure not being of the Value of 200 *l.* a Year.

After long Debate the *Lord Keeper* decreed, that the Defendant *Bladwell*, notwithstanding the Agreement with Plaintiff *Peyton*, should account for all the Profits of the Estate, which Sir *John Bladwell* had been in Possession of under that Agreement, over and above the 120 *l. per Ann.* and the Master was to see what was the Value of the Jointure Lands at the time of the Settlement: And the Defendant *Bladwell* was decreed to make good so much as the Jointure Lands fell short of 200 *l. per Ann.* at the time of the Settlement made. And Sir *John Bladwell* having devised some Lands by his Will to Plaintiff *Peyton*, the Defendant was decreed to make up those Lands 100 *l.* a Year, and to settle them on Plaintiff *Telverton Peyton* and his Heirs, according to the Marriage Agreement.

And altho' it had been strongly insisted by the Defendants Council, that the Agreement being to settle 100 *l. per Ann.* on *Telverton Peyton* and his Heirs, he had Power to release and discharge that Agreement; and there was no Benefit thereby intended to the Wife or Issue of that Marriage: And in case the Settlement had been actually made, it had been in Plaintiff *Telverton's* Power to have sold, or given away those Lands; the Settlement being to be made to him and his Heirs after the Death of Sir *John Bladwell*, and therefore he might well release the Agreement, as to that 100 *l. per Ann.* and no one could be said to be injured by it, no more than if he had devised away or sold those Lands:

Yet the Court declared its Detestation of such underhand Agreements; and that it was a Deceit and Fraud as to Sir *John Roberts*, who was drawn in to give a great Portion

tion with his Neice, in Expectation of a Settlement adequate to it, which by this means is to be frustrated: For tho' Plaintiff *Peyton* could have disposed of the Lands which were to have been settled on him and his Heirs, yet that is frequently done in many Settlements, the Father by that means being left at liberty to provide for his younger Children, and to reward them most, that behave themselves best: But still there is a Benefit intended to the Issue of the Marriage; and it is part of the Consideration, for which the Portion was given: And therefore declared this under-hand Agreement and Release to be fraudulent, and set the same aside, and decreed the Agreement to be performed, as to the 100 *l. per Ann.*

D E

Term. S. Trinitatis,

36 Car' II. 1684.

IN CURIA CANCELLARIÆ.

Case 234.

Baxter versus Manning.

3 Junij.

In Court
Lord Keeper.

Mortgagee
lends more
Money to the
Mortgagor on
Bond.

The Mort-
gagor shall not
redeem with-
out paying the
Bond Debt, as
well as the
Mortgage.

Post Case 236.

THE Plaintiff makes a Mortgage of his Estate to the Defendant, and afterwards the Mortgagee advances and lends more Money unto the Plaintiff the Mortgagor on his Bond: The Plaintiff brings his Bill to redeem. The Defendant insists to have his Bond Debt as well as the Mortgage-mony paid him.

Per Cur'. Altho' there is no special Agreement proved in this Case, that the Land should stand as a Security for the Bond Debt, yet the Mortgagor shall not redeem without paying both.

Case 235.

Bletfow versus Sawyer.

4 Junij.

In Court
Lord Keeper.

A Man settles
Land of 6*l.* per
Ann. to the
use of himself
for Life, then
to his Wife for
Life, and agrees
she shall hold
the Land, un-

THE Case was, a Man settles Lands to the Value of 6*l.* per Ann. and more, to the use of himself for Life, and after to his Wife for Life; and further agrees, that she shall hold and enjoy the same until 100*l.* shall be paid by his Heir to her Executors, Administrators or Assigns. The Feme makes a Writing, purporting to be her last Will, and

and thereby disposes of this 100*l.* and dies in the Life-time of her Husband.

The Question was, whether this 100*l.* were well disposed of or appointed by her: And the Plaintiff's Council insisted, that it was not intended she should have any benefit of this 100*l.* unless she should happen to survive her Husband, and then she might be capable of disposing of it by Will; but dying a *Feme Covert*, her Will was void; and her Husband was intitled to the Administration.

100*l.* shall be paid by his Heir to her Executors, Administrators, or Assignees: She by a Writing purporting her Will disposes of this 100*l.* and dies in the life of her Husband. A good Appointment in Equity.

Per Cur'. This Will is good, the Wife being as to this purpose, *quasi à Feme Sole*; and without doubt it is a good Appointment in Equity.

Secondly, That this was but a Chattel Interest in her; and that she might well dispose of it in her Husband's Life-time: And it was said in this Case, that where a *Feme Covert* saves Money out of a separate Maintenance, she might dispose of it as a *Feme Sole*; and that there had been several Decrees in this Court ratifying such Dispositions.

A *Feme Covert* in the Life of her Husband may dispose of Money laid up out of her separate Maintenance.

Shuttleworth versus Laywick.

Case 236.

WHERE there is a Debt secured by Mortgage, and also a Bond Debt; when the Heir of the Mortgagor comes to redeem, he shall not redeem the Mortgage without paying the Bond Debt too, in case the Heir be bound: So if there are two Mortgages, and one is defective, if he will redeem, he must take both.

7 Junij.
In Court.
Lord Keeper.

Mortgagee lends more Money to the Mortgagor on Bond; his Heir shall not redeem without paying off the Bond, as well as the Mortgage, in

case the Heir is bound. *Ante Case 234.* 2 Ch. Rep. 164. Where a Man has two Mortgages, and one is defective, if the Heir will redeem, he shall take both. 2 Ch. Rep. 23.

Case 237.

Beachinall versus Beachinall.

5 Junij.

In Court
Lord Keeper.

Settlement being alledged to be made in pursuance of a Marriage Agreement, a Tryal was directed, to try what was the Marriage Agreement, but ordered the Settlement should not be given in Evidence.

On a Bill of Review the last part of the Order reversed.

THE Bill was to be relieved touching a Marriage Agreement. Upon the Marriage there was a Deed executed, which imported to be a Settlement made in pursuance of the Marriage Agreement; but at the hearing there was strong Proof by *three* or *four* Witnesses, that this Deed was not drawn according to the Agreement; but that the Agreement was for settling more Lands of far greater Value, and to other Uses.

The Cause was heard by the *Lord Chancellor Nottingham*, who directed the Agreement to be tryed at Law, and the Deed to be left out of the Case, and not given in Evidence.

In a Bill of *Review* the Error assigned was, because by this Decree they were not permitted to give the Deed in Evidence: And for that reason the *Lord Keeper* reversed the Decree; saying, it was a strange Order to take away a Man's Evidence, and then send him to Law.

Case 238.

Trevanian versus Mosse.

Eodem die.

In Court
Lord Keeper.

Plea of a Purchase for a Valuable Consideration must alledge *Seisin* and *Possession* in the Vendor.

A Plea of a Purchaser for a valuable Consideration over-ruled, because the Defendant did not alledge *Seisin* and *Possession* in the Person, from whom he bought.

Fanshaw versus Fanshaw.

Case 239.

Eodem die.

In Court
Lord Keeper.

Plea of Privilege by some of the Defendants not good, if there is another Defendant not privileged.

TWO of the Defendants, being the Officers of the *Exchequer*, plead the Privilege of the *Exchequer*. Plea over-ruled, because there was a third Defendant, who had no right of Privilege.

2 Ro. 274. G. 1.

Bonfey versus Lee.

WHERE there is no Vicaridge endowed, the Impropiator of the small Tythes is bound to maintain a Priest; and upon an Information by the *Attorney General* for that Purpose, the King may assign to the Curate such an Allowance or Proportion of the small Tythes, as he shall think fit; but otherwise it is, where the *Vicar* is endowed, tho' but of never so small a matter. The Case of the *King* and *Sutton* in the *King's Bench* was cited.

Case 240.

Eodemdie.

In Court.

Impropiator of the small Tythes bound to maintain a Priest, where there is no Vicaridge endowed.

And in such Case the King may assign to the Curate such proportion of the small Tythes, as he thinks fit.

Otherwise where there is an Endowment, tho' never so small.

Godfrey versus Turner.

DEMURRER; because the Plaintiff had not made Oath of the Loss of his Deed.

Per Cur'. Where you come only for Discovery of the Deed, you need not make Oath of the Loss of it, as you must do, when you come for Relief; for you shall not translate the Jurisdiction without Oath made of the loss of the Deed.

Case 241.

5 Junij.

In Court

Lord Keeper.

In what Case a Plaintiff must make Oath of the loss of a Deed, where a Bill is brought touching such Deed.

Ante Case 56.
C. 175.

Gibson versus Scevenington.

THE Defendant having appeared, and afterwards stood in Contempt, till a Sequestration was returned, It was insisted by the Plaintiff's Council, that the Bill ought to be taken against the Defendant *pro confesso*: and cited two Precedents, where it had been so done; and said, it was no more than a Judgment by default at Law.

Case 242.

7 Junij.

In Court
Lord Keeper.

Bill taken *pro confesso* after Defendant's appearance and sequestration returned.

But the *Lord Keeper* would consider of it, till the next Term.

And

Otherwise
where Baron
and Feme are
Defendants, and
the Wife only
appears.

Sequestrators
on mesn Proce-
sses accounta-
ble for the Pro-
fits, and can
retain only so
far as to satisfy
for the Con-
tempts.

And it being alledged, that *Baron* and *Feme* were De-
fendants, and that it was the Wife only who had appear-
ed; and that without the Husband's Privity; the *Lord Kee-*
per referred it to a Master to examine that Fact, and said,
if it should fall out to be so, he could not decree against
the Husband: but they must proceed, and lay on the Se-
questration to bring him in: which the Plaintiff's Council
said, was but a sorry Remedy, in regard that Sequestrators
upon mesn Proceſs were accountable for all the Profits,
and could retain only so far as to satisfy for the Con-
tempts.

Cafe 243.

Eodem die.

In Court

Lord Keeper.

A. by Will in
1676 gives 600 l.
to Mr. Baxter
to be distribu-
ted amongst
60 ejected Mini-
sters.

Upon an Infor-
mation by the
Attorney Gen-
eral, decreed
the Charity to
be void, and
the Money to
be applied for
the Mainte-
nance of a
Chaplain for
Chelſea Col-
lege.

Attorney General verſus Baxter.

ROBERT Mayot, who was a beneficed Clergy-man
of the Church of England, by his last Will, 12 October
1676, bequeathed 600 l. to Mr. Baxter to be distributed
by him, amongst 60 Pious ejected Ministers, and adds, I
would not have my Charity misunderstood. I do not give
it them for the sake of their Non-conformity: but because
I know many of them to be pious and good men, and in
great want. He also gave Mr. Baxter 20 l. and 20 l.
more to be laid out in a Book of his, entitled, *Baxter's*
Call to the Unconverted.

Upon this Will Mr. Attorney General exhibited an Infor-
mation, wherein he alledges this Charity to be against
Law, and that therefore the Right of applying this Money
was in the King; and that his Majesty had declared his
Pleasure to be, that this 600 l. should go towards the
building of *Chelſea* College.

Mr. Baxter in his Answer stated the Controversy be-
tween the Conformists and Dissenters, and show'd upon how
small a Matter some, that conformed in all other Points,
were kept out of the Pale of the Church, and ejected from
their Livings: and then swore himself a Conformist, and
that

that he knew many poor pious and ejected Ministers, that were in great want, and forced to undertake servile Employments for their Livelyhood; and that he accepted of the Trust reposed in him by his Testator, and intended, as soon as he could get this Money of the Executors, to distribute it according to his Testator's Intention amongst poor ejected Ministers, who he supposed were not disabled by Law from taking of a Legacy; and said, he did not believe the Testator had any design against the Government; being very conformable to the Church, and one whom he never saw; and that the Testator was very charitable, and sets out many excellent Charities of his in his Life-time, that were legal and allowed: and as for the Book mentioned in the Testator's Will; it was, he hoped, not condemnable, nor ever condemned; but had been printed *two and Twenty* times, and licensed, &c. and hoped the Doctrine and Disposition of the Dissenters, meerly as ejected Ministers, was not so bad, as to forfeit all Charities; his *Majesty* having in his Declaration declared in these words, *viz. We must for the Honour of all of either Perswasion, with whom we have conferred, Declare, that the Desires of all for the Advancement of Piety were the same; their Zeal for the Peace of the Church the same; they all approve Episcopacy and a Liturgy in a set form; and if on such Excellent Foundations any such Structure should be for lessening the Gift of Charity, a vital Part of the Christian Religion, we shall think our selves unfortunate, and defective in the Administration of Government God hath intrusted us with,* &c. and Mr. Baxter said further, he thought his *Majesty* was not mistaken; and that not only Religion, but Humanity, binds Men to pity those who spent their Lives in studying to know God's Will, and yet by Mistake in some Opinions are fallen into Want; and therefore owned his dissent against resigning other Men's Sustenance, and hoped the Court would not misconstrue that Act of Charity.

The *Attorney* and *Sollicitor General*, &c. argued, that this was a Devise to the 60 ejected Ministers, *eo nomine*, as they were Dissenters; and to suffer them to take

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by

by such a Devise was almost to make a Corporation of them, and it would certainly encourage and keep up a perpetual Schism in the Church, which the Law would not endure.

For the Defendant it was argued, that this was a good Bequest, and that Dissenters were not disabled from taking a Legacy. Any Devise, tho' to a Superstitious Use, was good at common Law; and it wou'd not be pretended, that this Devise was within any of the Statutes of Superstitious Uses. The Devise was made by a Conformist, who had he or a Dissenter given 10 *l.* a-piece to 60 Dissenters, by Name, there would not be the least Pretence to make that Legacy void: And what has the Testator done here? He has deputed Mr. *Baxter* to name the 60 Persons for whom the Charity was designed; and what Law has disabled him from executing this Power of Nomination, tho' he had been a Dissenter? But he by his Answer has approved himself one of the Church of *England*: And it was said, there could be nothing of weight in the Objection, that such Bequests wou'd keep up a Schism in the Church; in regard here was nothing durable; no Land, no Rent, no Annuity given, only one gross Sum of 10 *l.* to a Man, which would only buy Bread for his Family for a very little while; but if that was a real Mischief, yet to damn this Charity, would be no Remedy to the Evil, for it would but teach the Dissenters for the future to name the Parties, or to dispose of their Charities in their Life-times; and in that Case the Dissenters will only have a better Opportunity of drawing out and extending their Donors Charities: And it was observed, that the Bequest was to *poor ejected Ministers*, now there are many ejected for want of Titles, and are fit Objects of Charity.

The *Lord Keeper* told Mr. *Attorney*, that Causes of this Moment ought not to be brought before him, but in Term time, when he might have the Assistance of the *Judges*: But however being he had now heard the Matter, and was

not doubtful in the Case, he would not defer making his Decree: and adjudged the Charity (that is the Use) to be void, and that the Money should be applied for building of *Chelsea* College.

Then it was urged, that if the Charity was void, the Money ought to remain with the Executor: But the Court said, there was a difference between the Charity and the Use; and that the Use was void, and not the Charity.

Then it was observed to the Court, that the Practice had always been to apply Charities *in eodem genere*, and this being intended for ejected Ministers, ought to go amongst the Clergy.

And thereupon the *Lord Keeper* decreed it for the Maintenance of a Chaplain for *Chelsea* College.

*Note, This Decree was reversed by the Lords Commissioners in Trinity Term 1689, and the 600*l.* which had been brought into Court, ordered to be paid out and distributed according to the Will.*

Churchill versus Lady Speake.

Case 244.

THE Case was, that one *Prideaux*, the Plaintiff's Grand-father, and Father of Sir *John Churchill's* Wife, being (amongst other things) Possessed of and Intitled to a Mortgage for 1000*l.* gave this Mortgage (amongst other things) to his Wife, willing her to give 500*l.* of it to the Plaintiff his Grand-daughter; (Sir *John Churchill's* eldest Daughter) *But as to the time when, and manner of giving it, he left it to his Wife's Discretion, as she should think fit, and best for his said Grand-daughter.* And having thus made his Will, he died about 1664, the Plaintiff his Grand-daughter being then an Infant of about 9 Years old.

A gives a Legacy to his Grand-daughter, an Infant, to be paid at such time and in such manner as his Wife, who was his Executrix, should think fit and best for his Grand-daughter.

The Executrix lived near twenty Years after the Death of A, and died without paying the Legacy.

Decreed the Legacy to be paid, with Interest from the Death of A, tho' no Demand made in the Life of the Executrix.

Mrs. *Prideaux*, the Plaintiff's Grand-mother, lived till 1683, and then died, making the Defendant the Lady *Speake* her Executrix, having paid no part of this 500*l.* neither was the same in all that time so much as demanded

of

of her : And the Plaintiff's Bill was to have this Legacy of 500*l.* given unto her by her Grand-father, paid with Interest.

And the *Lord Keeper*, notwithstanding there was not any Demand prov'd, and tho' Mr. *Prideaux* left the Time and Manner of paying this 500*l.* to his Wife, Decreed the 500*l.* with Interest from the Death of *Prideaux* the Grand-father, being near twenty Years.

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Term. S. Michaelis,

36 Car' II. 1684.

IN CURIA CANCELLARIÆ.

Anonimus.

UPON a Motion for leave to examine after Publication, upon making the usual Oath of not having seen the Depositions; the *Lord Keeper* declared, That in such a Case the other Side should be at Liberty to examine at large, as well as to cross-examine the Witnesses produced by the Party that made the Motion; (which was all he might do formerly) and his Reason was, that a crafty Solicitor may lye in the lurch, and examine nothing till after Publication is past; and the other Party may think himself secure, and so not examine to those Points, which he could otherwise have proved, in regard he finds his Adversary has not examined to those matters: And when once Publication is past, and the Party that examined has seen his own Depositions; then the Side that lay still having tyed up his Adversary, so that he can only cross-examine the other's Witnesses, applies for an Order upon the usual Affidavit to enlarge Publication, and when he has got that Order, then he comes in with a whole Cloud of Witnesses: and tho' it may be thought hard, that any one should have liberty to examine, after he has seen the

Case 245.

16 Octobris.

*In Court
Lord Keeper.*

If one of the Parties after Publication passed has an Order to examine upon the usual Affidavit, the other Party may not only cross-examine, but examine at large.

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Depositions; yet his *Lordship* thought it a reasonable Penalty on such, as would not examine in time; or that should lie upon the catch to take Advantage of the other Party; and ordered the Register to take notice of it as a fixt Rule for the future.

Cafe 246. *Corporation de Sutton Coldfeild verſus Wilſon.*

24 Octobris.

*In Court
Lord Keeper.*

Whether a
Member of a
Corporation
may be a Wit-
neſs for the
Corporation.

THE Question being, whether a Bond of 400 *l.* Penalty was intended for the Benefit of the *Corporation* or of the Defendant, and the Witneſſes for the Plaintiff being all Members of the *Corporation*, it was objected that they could not be read, they ſwearing for their own Benefit; which Exception was allowed as good: And the *Lord Keeper* ſaid, that a *Corporation* ought to have a Town Clerk and Under-Clerks that are not Freemen, that they may be competent Witneſſes upon Occaſion: And he ſaid he thought it very hard in the Cafe of the *Waterbailage* of *London*, that no one Freeman of the City, tho' it was not Six Pence Concern to him, could be admitted as a Witneſs: But there indeed the Fee was in Queſtion; and here being only a bare Sum of 200 *l.* in Diſpute, he thought that not conſiderable enough to take off a Man's Teſtimony; and ſaid it was uſual, where a Man was a Legatee, if it was an inconfiderable Legacy, as 5 *s.* (or 5 *l.* to a Man of Quality) that he ſhould nevertheleſs be a Witneſs to prove the Will.

Croſs-examin-
ing a Witneſs
by one Side in
any Matter ten-
ding to the Me-
rits, makes him
a good Witneſs
for the other
Side, tho' other-
wiſe liable to
an Exception.

At length it appearing, that the Defendant had croſs-examined ſome of the Plaintiffs Witneſſes not only to Queſtions, barely whether they were of the *Corporation* or not, but to other Queſtions which tended to the Merits of the Cauſe; the *Lord Keeper* declared, that made them good Witneſſes, tho' they were Members of the *Corporation*, and upon their Evidence it was decreed for the Plaintiffs.

Barlow versus Grant.

UPON a Bill for 100*l.* Legacy given to a Child, the Defendant insisted upon an Allowance of 16*l.* a Year for keeping the Legatee at School.

It was objected, that only the bare Interest of the Money ought to have been expended in his Education, and not to have sunk the Principal, as in this Case the Defendant had done.

But the *Lord Keeper* thought it fit and reasonable to be allowed; and said, the Money laid out in the Child's Education was most advantageous and beneficial for the Infant, and therefore he should make no Scruple of breaking into the Principal, where so small a Sum was devised, that the Interest thereof would not suffice to give the Legatee a competent Maintenance and Education: But in Case of a Legacy of 1000*l.* or the like, there it might be reasonable to restrain the Maintenance to the Interest of the Money.

In this Case there being 30*l.* also given to the Infant to bind him an Apprentice, the Infant died before he attained a competent Age to be placed out an Apprentice, and the Question was, whether this 30*l.* should go to the Executor of the Infant?

Lord Keeper. I think this 30*l.* ought to go to the Executor or Administrator of the Infant: And in this Case the Infant being 17 Years old, and having made a Will, and named an Executor, it was allowed to be a good Disposition of the 30*l.*

Case 247.

27 Octobris.

In Court
Lord Keeper.

Money expended for Maintenance and Education, shall be allowed out of a small Legacy given to an Infant, tho' it breaks into the Principal.

Otherwise, where the Legacy is considerable.

Legacy given to an Infant to put him out Apprentice, and he dies before he is of a competent Age to be put out.

It shall go to his Executor or Administrator.

Case 248.

Heycock versus Heycock.

Eodem die.

In Court.

Money devised
to be raised out
of Profits, and
the Profits will
not raise it in a
convenient
time, the Court
will decree a
Sale.

IN this Case the *Lord Keeper* declared, he took it to be the Law of this Court; that where there is a Devise of a Sum certain to be raised out of Profits of Lands; if the Profits will not amount to raise the Sum in a convenient time, the Court will decree a Sale.

Case 249.

Parker versus Ash.

28 Octobris.

*In Court**Lord Keeper.*

How the Spi-
ritual Court
proceeds where
there are Rasu-
res in a Will, and
the Executrix
submits to have
the Will proved,
as tho' no such
Rasures had
been therein.

THE Bill was for Payment of a Legacy, given to the Plaintiff by the Will of *A. B.* in which Will many Legacies, and (amongst others) the Plaintiff's Legacy, were erased, and such Rasures were supposed to have been done by the Testator in his Life-time: But when the Will came to be proved, and this Matter contested in the Spiritual Court, the Executrix submitted that the Will should be proved, as if no such Rasures had been made; and an Instrument purporting her Consent to this Matter, was annexed to the Will.

Lord Keeper. I take the Executrix to be concluded by this Consent, which prevented the Examination of the Matter when it was fresh; and it may be she knew that the Rasures could have been proved to have been made after the Death of the Testator: But said, the usual course in such Cases is to have a Sentence against the Rasure, and then a Probate granted with the Words razed out inserted therein.

Then the length of time since the Death of the Testator, and the Staleness of the Demand, were insisted upon.

But to this it was answered, that a Legacy is not within the Statute of *Limitations*; and length of Time is only

a Presumption of Payment: But in this Case the Defendant does not pretend a Satisfaction, but only contests the Duty. And there is this difference between Debts and Legacies, as to their Antiquity. Legacies always appear upon the Face of the Will, and so an Executor knows what he ought to pay, without being asked or told: But for Debts and other dormant Demands, against which he cannot provide without notice; there the Statute had reason to limit the Time.

The *Lord Keeper* decreed the Legacy against the Defendant, who was Executor of the Executrix: And the first Executrix having delivered over great part of the Assets to the Defendant in her Life-time, an Account had been afterwards stated betwixt them, and a Release given: However it was directed, that an Account should be taken of the whole Assets, and that what the Defendant had received, he was to answer out of his own Estate, and that what was wasted by the first Executrix, the Defendant was to answer as far as he had received Assets.

Massenburgh versus Ash.

Case 250.

Eodem die.

In Court

Lord Keeper.

Ante Case 230.

Post Case 298.

IT having been ordered at the hearing of this Cause, that a Case should be drawn up, as it stood upon the Deed, for the *Judges* of the *Common Pleas* to give their Opinion upon; it was now moved, that the *Lord Keeper* would rehear the Cause, and be attended with *Judges*, or that it might be presented to the *Judges* for their Opinions, as a Case in Equity, as well as a Point in Law.

The *Lord Keeper* declared his Opinion was, that he could go no farther in Equity, than the Law went in Case of an Executory Devise; but however directed the Case to be drawn up at large for the *Judges* Opinions, as well in point of Equity as of Law; and in case they were of an Opinion, that Equity ought to go farther than the Law, he would consider further of it.

Case 251.

30 Octobris.

In Court.
Lord Keeper.

Mortgagee recovers Judgment in Ejectment, but in combination with the Tenant in possession refuses to take out Execution.

He shall be compelled so to do, or answer for the Profits, as in Case of wilful Default.

Vid. post Case 262. *cap.* 265

Dux Bucks versus Sir Robert Gayer.

SIR Robert Gayer, who was a Mortgagee under the Duke, had brought an Ejectment, and recovered Judgment against the Duke of his *Berkshire* Estate, of which one *Goodchild* who had a Lease for 3 Years was in Possession, but paid no Rent, and was in truth insolvent: And Sir Robert Gayer in Combination with this *Goodchild* (who was accountable to the Duke for 18000*l.*) refused to take out Execution; and the Duke could not eject *Goodchild* by reason of Gayer's Judgment. It was therefore moved, that Sir Robert Gayer might be compelled to take out Execution, and receive the Profits in discharge of his Debt.

But it was said by the Council for the Defendant, that no Order was ever yet made to compel a Mortgagee to take out Execution, whether he would or not; and to order the Defendant to take out Execution, might involve him in a Suit with *Goodchild*: and it was to make him, *Nolens Volens*, the Duke's Bayliffe; and a Mortgagee, who desires to act discreetly, would not enter before he had foreclosed the Equity of Redemption.

The Duke's Council said, they would not compel Sir Robert Gayer to be the Duke's Bayliffe, but in Case he did not think fit to receive the Profits, they desired the Rent might be brought into Court; which the Court held reasonable; And ordered that unless Sir Robert Gayer take out Execution before the end of the Term he should be answerable for the Profits, as in Case of wilful Default.

Carter versus Carter.

Cafe 252.

31 Octobris.

In Court

Lord Keeper,

and Justice

Levins.

THE Cafe was; *Ralph Carter*, and *John Dawson* Executor of *Richard Carter* of the one Part, and *Anne Carter* the Widow of the said *Richard Carter* of the other Part, having submitted themselves to an Award, and entered into a Recognisance for Performance of it; an Award was made, wherein reciting, that the said *Richard Carter* had acknowledged a Judgment of 100*l.* to the said *Ralph Carter*; and that the said *Anne Carter*, as being *terre tenant*, was by reason of that Judgment disturbed in her Jointure; It was (amongst other things) awarded that the said *Ralph Carter* should acknowledge Satisfaction upon this Judgment.

If *A* and *B* on one Part and *C* on the other submit to Arbitration, the Arbitrators may make an Award, not only of matters in difference between *A* and *B* jointly, or *A* and *B* separately, and *C*, but also of Matters between *A* and *B*.

In a *Scire fac.* upon this Recognisance, the Breach assigned was, that Satisfaction was not acknowledged upon the Judgment: and the Exception taken by Mr. *Holt* was, that the Award was larger than the Submission: for when *A* and *B* of the one Part, and *C* of the other, submit to an Award; that is a Submission of the Differences that *C* had with *A* and *B* jointly, or with either of them severally; but this does not submit any Differences that might be between *A* and *B*. Now in this Cafe *Ralph Carter*, the Conusee of the Judgment, had two Remedies; one against *Anne Carter* as *terre tenant*, to bind the Lands; and another Remedy against the said *John Dawson* as Executor of the said *Richard Carter*, to follow the Personal Estate; and therefore the Award ought not to have been, that Satisfaction should be acknowledged on the Judgment, which destroyed both Remedies, but only that the Land should be freed and discharged from this Judgment.

But upon hearing of Mr. *Pollexfen* on the other side, the *Lord Keeper* and Mr. *Justice Levins* were both of Opinion, that the Award was well made, and the Breach

well assigned; for that all Parties concerned in the Judgment were before the Arbitrators; and *Ralph Carter*, who made the Submission, had the whole Power of the Judgment in him; and therefore ordered Judgment to be entered upon the *Scire fac.* unless better Cause was shewn to the contrary, &c.

Case 253.

Eodem die.

In Court

Lord Keeper.

Dunch versus Kent & al.

Deed of Trust for Payment of such Creditors as come in within a Year. A Creditor will not be excluded, tho' he doth not come in, till after the Year. But a Bill may be exhibited after the Year to compell the Creditors, who stand out, to come in or renounce the Benefit of the Trust.

THE *King* being indebted to *Colvile* a Banker in 84700 l. and *Lindsey* a Bankrupt having married *Colvile's* Widow, and Executrix, the *King* by his Letters Patents in Consideration of the said Debt, grants to *Lindsey* an Annual Sum Issuable out of the hereditary Excise, upon special Trust in the Patent declared, that all such of *Colvile's* Creditors, as would come in within a Twelve-month, and accept a Share of this Annual Sum proportionable to their Debts, should have the same assigned to them. The Year was long since past; and the Plaintiff being a Creditor of *Colvile's* brings his Bill to have the Benefit of this Trust, and complains that *Lindsey* had made several Assignments to the Defendants, who were none of *Colvile's* Creditors, and that *Lindsey* had out of *Colvile's* Estate paid off several Bonds, and kept the same on Foot, and made Assignments of them to the Defendants in Satisfaction of his own Proper Debts, under Colour whereof they had come in under this Trust, and had the Benefit of these Letters Patent.

In this Case for the Plaintiff it was insisted, that altho' *Colvile's* Creditors came not in within the Year, that yet this was a continuing Trust for them. And Mr. *Solicitor* did admit, that a Trustee for Payment of Debts in general may sell upon good Consideration, and the Purchaser, tho' he had Notice of the Trust, shall not be affected with any Misapplication of the Mony; for the Land being sold for a good Consideration, that is discharged; and it is the Mony

Where a Deed of Trust is for Payment of Debts in general, a Purchaser is not affected with any Misapplication of the Mony.

Mony that is to be apply'd for Payment of the Debts; unless the Debts be particularly mentioned in a Schedule, or in the Deed of Trust; and in such Case, the Purchaser must at his Peril see the Mony rightly imployed, and the Debts discharged: and it was admitted, that if *Lindsey* had Administred *Colvile's* Estate, and was in Disburse more than the Assets which he had received amounted to, that for so much *Lindsey* was a Creditor to *Colvile*, and should have the Benefit of this Trust.

Otherwife, where it is for Payment of Debts particularly specified.

But in this Cause there being many Defendants, and their Cases different and distinct, the Lord Keeper would not enter into the Debate of any of them, but referr'd it to a Master, to state all the Particular Cases to the Court, and directed the Master to certify when the Assignments were made, and whether for *Lindsey's* proper Debts, and whether *Lindsey* was a Creditor to *Colvile* at the time of the Assignments made; and in that respect he was to see, if *Lindsey* compounded any of *Colvile's* Debts; for he being Executor in right of his Wife, he could not have the Benefit of those Compositions.

Anonimus.

Case 254.

IN a Bill to be reliev'd touching a Lease for Years or other Personal Duty against Executors; tho' the Executors be but Executors in Trust, yet it is not necessary to make the *Cestuy que Trusts* or residuary Legatees Parties.

In a Bill against Executors, who are only Executors in Trust, it is not necessary to make the *Cestuy que Trusts* or Residuary Legatees Parties.

Palmer versus Trevor.

Case 255.

4 Novembris.

A. B. devised 100*l.* to the Plaintiff's Wife, to be paid within six Months after the Testator's Death; and a Bill being brought for this Legacy, the Defence, which the Defendant the Executor made, was, that he had paid the Legacy to the Plaintiff's Wife, and had her Receipt for it:

In Court Lord Keeper. Legacy bequeathed to a Feme Covert. Payment to her alone not good.

X x x

and

Where a Legacy is to be paid at a certain Day, it shall carry Interest from that time, if not paid.

and the Defendant's Council insisted, that this was a good Payment; for that without doubt a Man might so devise a Legacy to a Feme Court for her separate Maintenance, as that the Husband should not intermeddle with it, and that the Wife's Receipt should be a sufficient Discharge for it. And they further insisted, that such was the Intent of the Testator in this Case, and that the Will ought to be so construed in Equity; for at the time of making this Will, the Plaintiff and his Wife were parted, which was then well known to the Testator, and that the Wife was much straitned for want of Maintenance; and it was said that the *Civil Law*, whereby Legatory Matters were properly determinable, was, that such a Legacy ought to be paid to the Wife: But the Defendant's Council not being prepar'd to maintain that Point, the Lord *Keeper* held it no good Payment; and decreed the Legacy to be paid to the Plaintiff with Interest; it being to be paid by the Will at a certain time, *viz.* within six Months after the Testator's Death.

Case 256.

Eodem die.

In Court
Lord Keeper.
Committee of
a Lunatick
cannot make
Leases, nor in-
cumber the
Lunatick's E-
state, without
leave of the
Court.

Foster versus Merchant, & è Contra.

THE Bill was by a second Committee of a Lunatick against the first Committee & *al*, to call him to an Account for the Profits of the Lunatick's Estate.

Lord Keeper. The Committee of a Lunatick has an Estate but during Pleasure, and therefore cannot make Leases, nor any ways Incumber the Lunatick's Estate, without special Order of this Court, where the Profits are not sufficient to maintain the Lunatick.

Mortgage made
by a Lunatick,
when sane
for 50*l.* and
more Money
taken up upon
it by the Com-

In this Case, the Lunatick, before he became such, having made a Mortgage of good part of his Estate for 50*l.* the Committee had transferr'd this Mortgage, and taken up 3 or 400*l.* more upon it.

The

The Lord *Keeper* declared, the Mortgage should stand a Security for 50 *l.* only.

mittee, ordered to stand a Security only for the first 50 *l.* Committee not to be allowed for Buildings and Improvements on the Lunatick's Estate.

And as to Improvements and Buildings made by the first Committee on the Lunatick's Estate, for which he craved an Allowance; the Lord *Keeper* declared the Heir upon the Lunatick's Death must be let into the Estate, without making any Allowance for such Improvements.

And as to an Allowance demanded for the Lunatick's Son's Maintenance, the Lord *Keeper* referred it to a Master to examine and report, what Maintenance was reasonable to be allowed.

Master to see, what was fit to be allowed for Maintenance of the Lunatick's Son.

Deguilder versus Depeyster.

Cafe 257.

Eodem die.

THE Cafe was upon a *Bottomry* Bond, whereby the Plaintiff was bound in consideration of 400 *l.* as well to perform the Voyage within six Months, as at the six Months end to pay the 400 *l.* and 40 *l.* Premium, in case the Vessel arriv'd safe, and was not lost in the Voyage.

In Court Lord *Keeper*: A intending to go a Voyage, enters into a *Bottomry* Bond, but the Ship not going the Voyage, but lying all along safe in the Port of London, the Court decreed the Defendant shou'd lose the Premium, and accept of his Principal with usual Interest.

It fell out, that the Plaintiff never went the Voyage, whereby his Bond became forfeited: and he now prefer'd his Bill to be reliev'd; and upon a former Hearing, in regard the Ship lay all along in the Port of London, and so the Defendant run no hazard of losing his Principal; the Lord *Keeper* thought fit to Decree, that the Defendant shou'd lose the Premium of 40 *l.* and be contented with his Principal and Ordinary Interest: and now upon a Rehearing he confirm'd his former Decree.

Anonimus.

Cafe 258.

A few being to put in an Answer, upon a Motion it was Order'd, that he shou'd be sworn upon the *Pentateuch*, and that the Plaintiff's Clerk should be present to see him sworn.

A few ordered to be sworn to his Answer upon the *Pentateuch*.

Fitton

Case 259.

Fitton versus Com' Mackelsfeild.

Plaintiff allowed to bring a Bill of Review, without paying the Costs decreed in the Original Cause, upon making Oath he was not worth 40*l.* besides the Matter in Question.

UPON a Motion that a Bill of Review might be admitted, without Payment of the Costs of the former Suit, amounting to 150*l.* for which the now Plaintiff as was pretended had been in Execution almost 20 Years, and was not able to pay them.

Per Cur'. Upon his making Oath, that he is not worth 40*l.* besides the Matter in Question, and besides a Suit depending between the same Parties to foreclose a Mortgage, the Debt being pretended to be over paid, he shall be admitted to bring his Bill of Review without Payment of these Costs.

Case 260.

7 Novembris.
In Court.

A having a Bill remitted to him from beyond Sea for a particular purpose, receives part of the Money and takes a Note for the remainder, payable to himself or Bearer, and falling ill gives the Note to *B*, with orders to receive the Money, and apply it to the Use it was designed, and then dies. *B* receives the Money and applies it accordingly. The Administratrix of *A* brings Trover and recovers. *B* brings a Bill, and is relieved.

William Merreitt versus John Eastwicke and Anne his Wife, Administratrix of Hugh Pearce.

THIS Day the Lord *Keeper* being sent for to the Tryal of the Money in the *Pix*, Mr. *Baron Atkins* sat and went on with the Causes. And this Cause then coming on to be heard, The Case was, that the *King* of *Denmark* sent over the said *Hugh Pearce* his Huntsman into *England*, and remitted to him a Bill of Exchange for 843*l.* 13*s.* 6*d.* drawn upon one *Jacobson* a Merchant in *London*, to buy Horses and Dogs. He receives all the Money except 200*l.* and lays it out accordingly, and delivers up the Bill of Exchange, and for the other two hundred Pounds takes a Note from *Jacobson*, payable to himself or Bearer on demand, and then falls ill, and shortly afterwards dyed; but in his Sickness delivers to the Plaintiff, in whose House he lodged, this Note for 200*l.* and orders him to lay out the Money in Horses and Dogs for the *King* of *Denmark's* Use:

Use: Which he accordingly does, and afterwards goes to *Denmark*, and carries over the Horses and Dogs which had been bought, and accounts with the *King* for the Mony, and receives a Gratuity for his Trouble.

After the Death of *Hugh Pearce*, the Defendant *Anne* his Wife takes out Administration, and she and her now Husband bring an Action of *Trover* against the Plaintiff for this *two hundred Pounds*, and recover a Verdict.

The Bill was to be relieved.

Upon hearing of the Cause, Mr. *Baron Atkins* was of Opinion the Plaintiff came too late after a Recovery at Law, and would have dismissed the Bill: But Sir *Samuel Clarke*, Sir *Miles Cooke*, and Sir *William Beversham*, the Masters in Chancery, stood up and opposed it, being of Opinion, that there ought to be Relief and a Decree for the Trust; and thereupon the Court being divided, no Order was made.

A Judge sitting in the Absence of the Lord Keeper, being about to make a Decree is opposed by the Masters then present, whereupon the Cause is continued in the Paper.

And the Cause standing in the Paper the next Day, came on to be heard before the Lord Keeper, who declared, that he was satisfied that the 200 l. received by the Plaintiff was part of the *Eight Hundred Forty Three Pounds, Thirteen Shillings and Six Pence* remitted by the *King* of *Denmark*; and altho' *Pearce* had altered the Property by taking a Bill for it payable to himself or Bearer, yet *Pearce* was to apply it for the *King* of *Denmark's* Use, and the Plaintiff having made such Provision as *Pearce* should have done, ought not to be charged therewith as so much of the Estate of *Pearce*, he having accounted for the same; and it was ordered that all Proceedings at Law should be stayed till further Order: and there being an Account decreed touching some other Moneys, which Plaintiff had received, the Judgment was ordered to stand a Security for what should be found due from the Plaintiff

Y y y

tiff

tiff on the Account; but if nothing should appear to be due, Satisfaction was to be acknowledged on the Judgment.

Note, upon searching the Record of this Case it appears, that this Cause was heard before the *Lord Keeper* on the 8th of *November*, and such Decree made as above; but it does not appear by the Record that this Cause had come on before Mr. *Baron Atkins* the Day before.

Case 261.

10 Novembris.

In Court.

Lord Keeper.

Bill of Peace
for preventing
multiplicity of
Suits proper:

New Elme Hospital versus Andover

THERE having been time out of Mind a Fair held at *Weyhill* near *Andover*, which was within the Hundred and Manor, whereof the Corporation of *Andover* were Lords; But the Pickage and Stallage and other Profits of this Fair being enjoyed by Particular Tenants, who claimed several Acres of the Land on *Weyhill* (on which the Fair was held) as belonging to their respective Estates within the Manor; and other Part of the Soil and Profits being claimed by the Hospital of *New Elme*, and other Part by the Parson of *Wey*; so that the Corporation had but little or none of the Profits of the Fair; The Corporation, upon surrendering of their old Charter, got a Clause inserted in the New One, that they might hold the Fair in what Place they pleased, (which Mr. *Attorney* said, was only an Explanation of what the Law implied upon the old Charter, the Fair being granted to them) and now for their own Profit they would remove it to another Place, the Soil whereof belonged to the Corporation; and hereupon several Actions being brought on both sides, the Bill was brought against the Town of *Andover* by the Tenants of the Hospital and Parson, to quiet them in their Possession.

It was objected by the Defendants, that the Bill was not proper, the Right not having been settled by Law; for
6
tho'

tho' the Defendants had recovered in two several Actions, yet these Verdicts were both set aside, as having been gained by a Practice upon, and undue Sollicitation of, the Jury; and the Judges had certified the Verdicts to have passed contrary to their Direction.

Lord Keeper. I take such a Bill to be very proper in this Court, being a Bill of Peace, and in such Case this Court ought to interpose and prevent Multiplicity of Suits: But in this Case the Bill praying only special Relief, *viz.* that they might be quieted in Possession, till the Right was tryed at Law, and not having prayed Relief in the Premises or a perpetual Injunction, the *Lord Keeper* thought the Bill not proper for a Decree; and directed the Plaintiffs to amend the Bill in that Particular. And the Town of *Andover* having a Bill to change the Venue, complaining that they could not have a fair Tryal in the County where the Action was laid, that Bill was dismissed.

Bill to change
a Venue dis-
missed.

Chapman versus Tanner.

A Bankrupt, before he became such, having made a Mortgage of his Estate, the Assignees of the Statute bring an Ejectment for Recovery of the Lands comprized in the Mortgage. The Mortgagee refuses to enter, but suffers the Bankrupt to take the Profits, and to fence against the Assignees with this Mortgage.

Lord Keeper. The Mortgagee shall be charged with the Profits from the time of the Ejectment delivered.

Another Point in this Case was, that the Bankrupt having bought Land, and all the Purchase-mony not being paid, the Assignees would have had the Vendor come in as a Creditor under the Statute, for the Remainder of his Purchase-mony.

Case 262.

Eodem die.

In Court
Lord Keeper.

Mortgagor becomes a Bankrupt, and the Mortgagee refuses to enter, and permits the Bankrupt to continue in Possession, and to fence against an Ejectment brought by the Assignees, with this Mortgage.

Mortgagee shall be charged with the Profits from the time of the Ejectment.

Ante Case 251.
Post Case 265.

Per

A sells Land to *B*, who afterwards becomes a Bankrupt, part of the Purchase-mony not being paid. *Per Cur'*. In this Case there is a natural Equity, that the Land should stand charged with so much of the Purchase-mony as was not paid; and that, without any special Agreement for that Purpose.

A shall not be bound to come in as a Creditor under the Statute, but the Land shall stand charged with the Mony unpaid, tho' no Agreement for that Purpose.

Case 263.

Barrell versus Sabine.

11 Novembris.

In Court
Lord Keeper.

What Circumstances may induce the Court to make an absolute Conveyance redeemable or not.

UPON the hearing this Cause, the single Question was, Mortgage or no Mortgage; and it being before the Statute of *Frauds* and *Perjuries*, for Proof of its being a Mortgage, it was urged for the Plaintiff, *first*, the over Value, *viz.* that it was a Church Lease of 180*l.* *per Ann.* over and above the Rent reserved and all Reprises, and renewed at the time of the pretended Purchase, and made up a compleat Term for 21 Years. And Mr. *Serjeant Barrell's* Purchase-mony was but 950*l.* of which not one Penny came to the Vendor's Hands, but all went for discharging Incumbrances, and in Repairs and renewing the Lease; and that the Defendant was offered much about the same time for this Lease 1400*l.* *Secondly*, that *Sabine* was at the Charge of the Conveyance. *Thirdly*, that *Serjeant Barrell* should declare, if *Sabine* would repay his Mony within a Year and half, and give the *Serjeant* 100*l.* for his Pains, *Sabine* should have his Estate again; and to prove that such a Declaration was sufficient to make it a Mortgage, they cited the Cases of *Cole* and *Martin*, and *Beale* and *Collins*.

On the other Side it was answered, the over Value was not so great as was pretended, and that this had all the Forms and Steps of an absolute Purchase; there being first express Articles for an absolute Purchase, and then a Conveyance made in pursuance of those Articles, and Possession delivered immediately upon Execution of the Conveyances.

The

The *Lord Keeper* said, he was fully satisfied, that it was not originally a Mortgage, but an absolute Purchase: But believed *Sabine* might complain he had sold his Estate too cheap, and that thereupon Mr. Serjeant *Barrell* might declare, if he would repay him his Money within one Year, and give him 100 *l.* for his Pains, that he should repurchase his Estate, which *Lord Keeper* believed was the true State of the Case: And cited Sir *Anthony Cage's* Case of a Clause to repurchase, which made so much stir in *Westminster-Hall*: And said, he thought that where there was a Clause or Provision to repurchase, the Time limited ought to be precisely observed; and said, that as to the *Serjeant's* Agreement, that *Sabine* might repurchase for 100 *l.* more, that seemed reasonable in respect of his Trouble, and for that the Estate was the more valuable, as having gone through a Lawyer's Hands, who understood the Title, and that might be a means to encourage Purchasers. And dismissed the Bill.

Where there is a Clause or Provision in the Conveyance, for the Vendor to repurchase, the time limited for that Purpose ought to be precisely observed.

Baily versus Devereux.

Case 264.

13 Novembris.
In Court
Lord Keeper.

UPON a Motion for an Injunction, the Case was; that an Action of Assault, Battery, and false Imprisonment was brought at Law against the Plaintiff for Arresting the Defendant on a Commission of Rebellion, which issued irregularly.

This Court will not suffer a Man to be Sued at Law for executing the Process of the Court, tho' it issued irregularly.

Per Cur'. The Plaintiff must have an Injunction; for the Irregularity ought to be punished in this Court, and can only be examined and determined here, whether regular or not; for at Law, supposing the Commission of Rebellion issued regularly, they will not allow *that* as a Justification; and therefore the Injunction was granted; and it was referred to a Master to examine whether the Commission of Rebellion issued regularly or not; and in case he found it irregular, to tax the Defendant his Costs.

Cafe 265. *Coppring* versus *Cooke*: & *Cooke* versus *Knight*
& *al*.

14 Novembris.

In Court
Lord Keeper.

Mortgagee enters, and thereby prevents subsequent Incumbrancers from entering, and yet permits the Mortgagor to receive the Profits.

He shall be charged with all the Profits he had or might have received since his Entry.
Ante Cafe 251.
8c 262.

BILL to redeem a Mortgage. The Cafe was, that the Mortgagee had obtained Judgment in Ejectment, and entered on the Mortgaged Premises, and thereby prevented other Creditors that had subsequent Securities from entering, and yet permitted the Mortgagor to take the Profits; and now the other Creditors coming to redeem him, the Court ordered the Mortgagee should be charged with all the Profits he had, or might have received since his Entry.

Tyle versus *Tyle*.

Cafe 266.

17 Novembris.

In Court
Lord Keeper.

Black Acre is devised to *J. S.* with a Proviso, that if he be evicted, he shall have White Acre: *J. S.* is evicted of a Moiety of Black Acre.

He shall only have a Satisfaction *pro tanto* out of White Acre.

A Man by Will devises Lands called *Styles*, to his younger Son, and thereby declares, that in case his Son should be any way hindered or prevented from enjoying the Lands called *Styles*, then in lieu thereof he gave him all those his Lands called *Barra Bar*.

The Plaintiff by his Bill sets forth, that he was the Heir of the Devisor, but that neither he, nor in truth the Devisor, was intitled to more than to one Moiety of the Lands called *Styles*, and that the Defendant *I. N.* a Stranger was intitled to the other Moiety, and had evicted the Devisee: And sets forth that *Barra Bar* was of much greater Value than *Styles*, and that it was not through his default, that the Devisee did not enjoy *Styles*; and charged a Combination betwixt the Devisee and the other Defendant *J. N.*; and prayed Relief as to the over Value of *Barra Bar*.

The *Lord Keeper* was clear of Opinion, that this being a Condition, that lay in Compensation, the Plaintiff ought to be relieved; and Decreed, that the Defendant the Devisee should have a Compensation, for the Land evicted, set out in *Barra Bar*, and that the Plaintiff should be relieved as to the over Value. But the Defendant *I. N.* that had the other Moiety of *Styles*, having all along fomented Suits on both Sides, and the Court threatening to saddle him with Costs, he submitted, that the Defendant the Devisee should have his (*I. N.*) Moiety of *Styles*, and he to take a Compensation out of *Barra Bar*: and it was Decreed accordingly.

Cotton versus Iles.

Cafe 267.

19 Novembris.

In Court
Lord Keeper.

A Man purchases absolutely of a Mortgagee in Fee in possession, and dies.

As between his Heir and Executor it shall be considered as real Estate and go the Heir.

MORTGAGEE in fee enters for a Forfeiture, and after seven Years Enjoyment absolutely sells the Land to *I. S.* and his Heirs.

Per Cur. The Estate shall not be looked on to be a Mortgage in the Hands of *I. S.* so as to make it part of his Personal Estate, but it shall be for the Benefit of the Heir.

Johnson Executor of Hill versus Nott.

Cafe 268.

Eodem die.

In Court
Lord Keeper.

Ante Cafe 161.

If an Heir sells a Reversion in the life of his Father at an under Value, the Court will not in favour of such a Purchase decree a specific Performance of a Covenant for further Assurance.

HILL bought of the Defendant *Nott* in the Life-time of Sir *Thomas Nott* his Father the Reversion of a House at *Richmond* at an under Value, by reason of the Contingency, that if the Defendant *Nott* had died in the Life-time of Sir *Thomas* his Father, *Hill* had lost all his Purchase Mony; and after the Death of Sir *Thomas Nott*, who died about ten Years after this Contract was made, *Nott* brought his Bill to be relieved against the Bargain, and was relieved by *Lord Nottingham*, but upon a Rehearing before the *Lord Keeper* that Decree was reversed.

Now

Now this Bill was brought by *Johnson* the Executor of *Hill*, setting forth that *Nott* the Defendant was only Tenant in Tail, and had covenanted to make further Assurance, and prayed he might be compelled to perform his Covenant in *Specie*, and be Decreed to levy a Fine.

Upon the Hearing the *Lord Keeper* denied the Plaintiff any Relief, and said upon the first Hearing on *Nott's* Bill he thought it a hard Case, tho' he did not see sufficient Reason to set aside the Contract: But as to the Plaintiff's Bill he said a Contract which carries an Equity to have it Decreed in *Specie*, ought to be without all Objection; and said the Practice of purchasing from Heirs was grown too common, and therefore he would not in any Sort countenance it; and dismissed the Bill, and left the Plaintiff to bring his Action of Covenant at Law.

Plampin versus Betts.

Case 269.

20 Novembris.

Lord Keeper.

A Decree, whereby the Defendant was to be concluded by the Plaintiff's own Oath, reversed.

ON a Demurrer to a Bill of Review. The Plaintiff by his original Bill suggests, that all Receipts touching the Dealings in question were lost, and prays an Account and Discovery from the Defendant. The Defendant in his Answer sets forth his Books of Account and his Receipts and Payments; and swears, he received no other Mony of the Complainant's.

After this the Plaintiff produces his Receipts, which differ, as to the Dates, from the Entries in the Books of Account set out by the Defendant in his Answer: and after many Wrangles in taking the Account, an Order was made by the Lord *Chancellor Nottingham*, that in case the Plaintiff would make Oath that he believed the Sums in Question to be distinct Sums, they should be taken as such. And *this*, as also that the Plaintiff's Oath in some other Cases should conclude, was the Error assigned; And

for that Reason the Decree was reversed; the *Lord Keeper* saying, there was no Colour to make such an Order; but if there had been sufficient Evidence without, and the Oath had been *ex abundanti* only, it had been otherwise.

Pusey versus Pusey.

Cafe 270.

Eodem die.

In Court
Lord Keeper.

BILL was, that a *Horn*, which Time out of Mind had gone along with the Plaintiff's Estate, and was delivered to his Ancestors in ancient time to hold their Land by, might be delivered to him; upon which *Horn* was this Inscription, *viz. Pecote this Horne to hold Huy thy Land.*

Land held by
the Tenure of
a Horn
Bill brought
by the Heir for
the Horn.

The Defendant answered as to Part, and demurred as to other Part; and the Demurrer was, that the Plaintiff did not by his Bill pretend to be intitled to this *Horn*, either as Executor or Devisee; nor had he in his Bill charged it to be an *Heir loome*.

The Demurrer was over-ruled, because the Defendant had not fully answered all the particular Charges in the Bill, and was ordered to pay Costs. And the *Lord Keeper* was of Opinion, that if the Land was held by the Tenure of a *Horn* or *Cornage*, the Heir would be well intitled to the *Horn* at Law.

vid. 1. Inf
107. a.

Sherbone versus Clerk.

Cafe 271.

Eodem die.

In Court
Lord Keeper.

DEmurrer to a Bill brought to discover the Tenant to the *Præcipe* on a voluntary Conveyance, allowed.

vid. ante Cafe
210.

Smith versus Turner.

Cafe 272.

Eodem die.

UPON a Bill of Review the Error assigned was, that there was no ground for making this Decree,
A a a a more

more than that it is mentioned in the Decree, that it was made by the Consent of the Plaintiff's Council, and he ought not to be concluded by the Consent of his Council: And that was allowed to be a good Error: As also that the Decree was made by the *Master of the Rolls* alone, and he cannot by his *Commission* make a Decree without the Assistance of two *Masters*.

Note, This Case not being warranted by the Record, it is thought fit to insert the Words of the Record it self, which are as follow, *viz.*

Lord Keeper.

*Jovis Viceffimo Die Novembris, Anno Regni Carol' Secundi
Regis Triceffimo Sexto, inter Edwardum Smith Barr' Quer'.
Anna' Turner Vid. Defend.'*

THE Matter upon the Plea and Demurrer put in by the said Defendant to the Plaintiff's Bill of *Review*, coming this Day to be heard and debated before the Right Honourable the *Lord Keeper* of the Great Seal of *England*, in the Prefence of Council learned on both Sides, upon opening the Matter of the said Defendant's Plea, which is grounded on a Submission or Consent of the now Plaintiff *Smith's* Council to a Decree made in a former Cause, wherein the Defendant *Turner* was Plaintiff, and the now Plaintiff *Smith* Defendant, and therefore the Decree in the former Cause, against which the Plaintiff's Bill of *Review* seeks Relief, being grounded on a Consent, ought not to be Impeached or Prejudiced by the now Plaintiff's Bill. Upon Debate of the Matter of the Bill, Plea and Demurrer, this Court held the said Plea and Demurrer to be good and sufficient, and doth order, that the same do stand and be allowed.

Lloyd

Lloyd versus Gunter.

Case 273.

Eodem die.

THE Defendant had pleaded a former Decree in Bar to the Plaintiff's Bill: But the Plea was not suffered to be opened, for that it came in after a Proclamation returned; and also came in by a general Commission which was to take the Answer only, and not to plead Answer or Demur.

Defendant cannot plead after a Proclamation returned.

Nor can a Plea be taken upon a general Commission to take the Answer only.

Hills & al' versus Universitat. Oxon. & al'. Case 274.

24 Novembris.

*In Court
Lord Keeper.*

IN the eighth Year of King Charles the first, there was a Patent granted to the University of Oxford to print Bibles and other Books not prohibited. 30 Martij 8 Car' that Patent is confirmed, and limits, that there shall be but two Presses and three Printers. The Plaintiffs claim as the King's Printers, under several Patents continued down by meane Assignments, and bring their Bill to restrain the Defendants from Printing Bibles, &c. And it was observed, that the Bible was Translated at the King's own Charge; so that the Copy was his; and that Printing was brought in by Henry 6th at his own Charge.

How far the University of Oxford's Privilege of Printing Bibles, &c. extends.

The Lord Keeper was of Opinion, that it was never meant by the Patent to the University, that they should print more than for their own Use, or at least but some small number more, to compensate their Charge: But as they now manage it, they would engross the whole Profit of Printing to themselves, and prevent the King's Farmers of the Benefit of their Patent: However he said, the Validity of the several Patents was a Matter proper to be determined at Law, and the Plaintiffs were now proper only for a Discovery, and therefore ordered that the Plaintiffs should bring an Action at Law in the Kings-Bench, against the University, or the Defendants Parker and Guy who claimed

claimed under the Patent to the *University*, and that it should be tryed at the Bar; and the Defendants were to admit they had printed a competent number of Bibles at the Tryal. And tho' the Plaintiffs pressed much for an In-

Vid. ante Cese
109.

junction to stay the *University* Printers from going on with the Printing of Bibles until the Tryal had settled the Right, yet the *Lord Keeper* refused to grant it, in regard that in case the Right should be found with them, they would by such Prohibition receive a Prejudice, that he could not compensate nor make good to them.

Cafe 275.

Newhouse versus Milbank.

Eodem die.

Prohibition to
an inferior
Court for hold-
ing Plea of a
Matter out of
their Jurisdiction.

A Prohibition granted to an inferior Court upon a Suggestion, that they held Plea of a Matter out of their Jurisdiction.

Cafe 276. *Bartholemew versus Meredith alias Moorehead.*

27 Novembris.

Lord Keeper.

Lands devised
to be sold for
Payment of
Portions, one
of the Children
dies after the
Portion be-
comes due, and
before the Land
fold, the Admi-
nistrator is in-
titled to the
Mony.

J. S. by Will devises Land to be sold for Payment of Portions to his younger Children; one of the Children dies after the Portion becomes payable, but before the Land fold.

Per Cur'. The Administrator of the Child that is Dead, is intitled to the Mony.

Cafe 277.

Palmer versus Young.

Eodem die.

Three Lessees
of a Church
Lease.

One renews
in his own
Name. It
shall be a Trust
for all.

ONE of the three that held a Lease under a Dean and Chapter, surrenders the old Lease and takes a new one to himself.

Per Cur'. It shall be a Trust for all.

Attor-

Attorney General versus Vernon, Brown, and Bobeme. Case 278.

THE Bill was, that his Majesty, in right of his Dutchy of *Lancaster*, was seized of the Honour of *Tudbury*, the Forrest of *Needwood*, and of many other particular Lands in the Bill specified, and that the Defendants had intruded and committed Waste; sometimes alledging the Lands descended to them or some of them from their Ancestors; at other times pretending a Grant thereof from his Majesty: Whereas if there was any such Grant, it was obtained by Surprize, and by false Particulars; many things being omitted or not valued, and those that were valued, were much under-valued, and that it did not pass in the usual Form of Grants of Inheritance under the *Dutchy* Seal; and that Endeavours were used to stop the Grant, but without Effect.

Bill in Equity
lies to set aside
Letters Pat-
ents obtain-
ed by Fraud.

To this Bill or Information the Defendants pleaded, that they had paid to his Majesty 7000 *l.* in Mony, and had conveyed to him the Lands, whereon the Fort of *Sherenese* was built, and that in Consideration thereof, and of the King's special Grace and Favour, by Letters Patents under the *Dutchy* Seal, executed by Livery, in Pursuance of a Warrant under the King's Signet or Sign Manual, his Majesty did grant to Defendants *Brown* and *Bobeme* in the Words following, (and then set out the Letters Patent) and the Defendant *Vernon* averred, that, tho' the Patent passed in the Name of the other Defendants, yet *that* was done to prevent a Merger of several Leases, he had in part of the Premises, and that, as he believed, the Grant was intended in favour of him, who had served his Majesty and the late King with the Hazard of his Life, and had suffered much for them, both in his Person and his Estate; and that therefore, and for that Letters Patents could not be avoided by an *English* Bill, but the Matter

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in Question was properly at Law, and ought to be determined in the *Dutchy*; and that, as the Defendants were Purchasors, Equity ought not to avoid their Grant, or to put them to discover matters in avoidance of it.

And by the Defendants Council it was insisted, *first*, That there never had been any Precedent of this nature to repeal Letters Patents by an *English* Bill in *Chancery*; but as to that, it was *Causa primæ Impressionis*. *Secondly*, That a Title under Letters Patents is a Title purely at Law, and determinable there, and that likewise there is a proper Remedy by *Scire fac'*. *Thirdly*, As there was no Precedent of any such Bill, so it was Impracticable to proceed here, for that the Letters Patents pleaded, and all other Letters Patents, are matter of Record, and cannot be disannulled, but by a Matter of as high a Nature: and the *English* Side of the Court of *Chancery* is no Court of Record; and therefore Letters Patents cannot, neither can a Fine, be vacated or cancelled by a Decree on an *English* Bill: but if any Thing could be done on such Bill; at most it could be, but to decree a Reconveyance; and that was not prayed by the Bill. *Fourthly*, It was observed, that the word *Fraud*, which, if any Thing, must give Jurisdiction to the Court in this Case, was not in the whole Bill; for that the whole Charge of the Bill goes but to two Things only, *viz.* *First*, That the Patent passed overhastily, and had not its due Progression through all the Offices, as in the Case of a Grant of an Inheritance under the *Dutchy* Seal, according to the Usage of that Court, it ought to have had. And *Secondly*, That this Grant was obtained by Misinformation and false Particulars, or at least that his Majesty was not duly and fully apprized of the Value of the Lands, when this Grant passed.

As to the first of these Objections it was said, that the Grant passed duly, or not; if not, that would avoid the Grant at Law: and the Usage of the *Dutchy* Court

Court is most properly determinable there: but if it passed regularly and according to Law, there could be no Objection upon that Account against it in Equity: And it was urged further, that tho' it might be reasonable, where there is a general Warrant for a Grant, that it should pass through all the proper Officers Hands, to the intent they might examine, and take care, that the Grant be not larger or more comprehensive than his Majesty intended it: yet where there is a Warrant to pass a Patent in *hæc verba*, (as in this Case there was) there the Particulars and Manner of the Grant is fixt and ascertained by the Warrant, and there needs no such Care or Scrutiny of the Officers about it.

As to the second Objection; it was said, it had never yet been thought a Reason sufficient to avoid the *King's* Grant, because he did not receive a Consideration adequate to the Value of the Land: For *Kings* are supposed to be bountiful, and not to make a bare *Smithfield* Bargain: And tho' it should appear upon an Examination in this Court that there was an over Value, yet that would be no Reason to avoid this Grant, for that the Grant is not only in Consideration of the 7000*l.* in Money paid, and of the Conveyance of the Lands at *Shereness*, but also of the *King's* special Grace and Favour; and the Defendant *Vernon* has by his Plea shewn himself to be a Person, who had some Title to the *King's* Favour; he having served his Majesty and the late *King* with the hazard of his Life, and suffered for their Service both in his Person and in his Estate; and expressly avers, that the Patent was intended in favour of him, tho' not taken in his Name, to prevent a Merger of his Leases: And then when the Value shall appear, how much shall be said to pass in respect of the *King's* Bounty, and how much in respect of the Consideration paid? Certainly whatever the over Value shall be, it ought to be imputed to the *King's* Bounty; Unless the Law had prescribed Limits (which it hath not) to the *King's* Grace and Favour. And it was further observed, that the Defendant *Vernon* had several long

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Leases

Leases of part of the Premises, and in those Leases the Rents reserved were thought a good Consideration; and those Leases were not yet impeached; and not only the same Rents were continued, but an increase of Rent was reserved on the Grant of the Inheritance: and so the same Consideration goes to that too. *Fifthly*, That there was a Particular *Non obstante* in the Patent, that it should not be Impeach'd for mistaking, or not mentioning the Values; and a Covenant for further Assurance, in case the Grant was any way defective; and that the force of such a *Non obstante* was properly determinable at Law. *Sixthly*, If Letters Patents shall be impeached by English Bill in *Chancery* upon such Suggestions and Pretences as these, no Patentee can be safe; nor shall the King's Seal be of any force; and unless the utmost Consideration was paid, the Grant shall be open to the best Bidder; and after never so long an Enjoyment the Patentee shall be called in here, and entangled in Proofs of the Values of the Lands granted: And since *nullum Tempus occurrit Regi*, nothing hinders but they may go back and repeal Letters Patents made by King James, or as much farther back as they please. *Lastly*, The Defendants were Purchasers, and had pleaded themselves so to be; and 7000*l.* was actually paid, and their Lands at *Shereneſs* conveyed to the King; and therefore, as Purchasers, they were intitled to the Protection of the Court; and in case their Grant was defective, they might possibly have an Equity to have it supplied here: but there was no Equity to destroy a Purchaser's Grant; neither was it the Practice of this Court to compel a Purchaser to answer Matters, whereby to impeach his Grant; and if the Defendants should be forced so to do, the Consequence thereof might be, to strip them of their Purchase, and yet be left without Remedy for the Consideration paid, and Lands conveyed.

For the King it was insisted by the Counsel, *first*, That in this Case a bare Purchase was intended, and not a Gratiuity; and that the Letters Patent were obtain'd in respect

respect of the Consideration paid, and not as of the King's Bounty; for that would have much alter'd the Case.

Secondly, As it was intended a Purchase only; so it was unduly obtain'd by false Particulars: and it was no small Evidence of the Fraud, that it was carried on in such Haste, and by such unusual Methods.

Thirdly, That the *King* in this Case was properly relieveable in this Court by *English* Bill. *First*, For that the *King* may sue in what Court he pleases. *Secondly*, The Bill charges a Surprise and false Particulars; and a Fraud is properly relieveable here. *Thirdly*, That the *King* ought not to be in a worse Condition than a Subject; and a *Nobleman* shall be relieved for such a Fraud put upon him by his Servant: and in case the *King* shall not be relieved in this Case by an *English* Bill, he will be without Remedy. *First*, For that there is no Remedy to be had in the *Dutchy* Court; for that is only a Court of *Revenue*, and not a Court of *Law*; and for that cited *Owen* and *Holt's* Case in my Lord *Hobart*, fo. 77. and the Case of *Dowty* and *Fisher* in the *King's-Bench*; and besides the Complaint of the Bill was, that the *Chancellor* of the *Dutchy* had not done well in this Matter. *Secondly*, As this Case was, the *King* could have no Remedy by *Scire fac'* for that these Patents were no Record of this Court; and for that in a *Scire fac'* the Deceit ought to appear within the Body of the Patent; but the Matters upon which the Bill seeks Relief are Frauds in obtaining the Grant, and Matters *dehors* the Patent. 1 Vent. 155.

Fourthly, They said, there could be no such Danger, as was pretended, to ancient Patents; for that the Equity will not be the same against an ancient Patent, where there has been a long Enjoyment under it, as against a Patent newly passed, and fresh in Agitation: And as to ancient Patents, it shall be presumed the *King* intended a Bounty, which will alter the Case. As to what has been urged,

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that

that there was no Precedent for such an *Engliſh* Bill, it was ſaid, there is no Precedent of any Grant of ſuch Value paſſed on ſuch Conſideration.

Lord Keeper. The Queſtion is ſhort, Whether there be a Fraud, or not? if a Fraud, it is properly relievable here. It is not fit ſuch a Matter as this ſhould be ſtifled upon a Plea; and therefore the *Lord Keeper* over-ruled the Plea, and denied to ſave the Benefit of it till the Hearing, becauſe he would not give any Countenance to ſuch a Caſe.

Elme verſus Shaw.

Cafe 279.

8 Decembris.

In Court
Lord Keeper.

DEmurrer allowed, but without Coſts, becauſe it was a Demurrer only, without any Answer, and came in by Commiſſion.

Goffe verſus Whalley.

Cafe 280.

Eodem die.

Money raiſed by
the Heir by Sale
of Real Aſſets
before Original
filed, if Aſſets
in Equity.

BILL brought againſt an Heir to diſcover what Aſſets he had by Deſcent, and to ſubject Money raiſed by Sale upon Alienation before any Original filed, and to diſcover the truſt of Lands deſcended before the Statute of *Frauds* and *Perjuries*, which makes the Truſt of an Eſtate deſcended Aſſets.

The Defendant pleaded Alienation before Original filed, and that the Truſt of an Eſtate deſcended was not Aſſets in his Hands.

But the *Lord Keeper* ordered he ſhould answer, ſaving the Benefit of his Plea to the Hearing.

Anonimus.

Anonimus.

Cafe 281.

SUMS under 40 s. to be allowed the Party on his Oath, but then he must in his Affidavit mention unto whom paid, for what, and when.

Sums under 40 s. allowed on the Party's own Oath, but then he ought to swear, when, and to whom, and for what they were paid.

Dan versus Allen.

Cafe 282.

1 Decembris.

Lord Keeper.

PER Cur'. An Assignee shall not have a *Scire fac'* to revive a Decree that is not Signed and Inrolled: But after the Decree is Inrolled, an Assignee may bring a *Scire fac'* to revive it: In like manner as at Law, if there be Judgment for an Annuity, and the Annuitant afterwards sells the Annuity, the Vendee shall have a *Scire fac'* upon this Judgment. But tho' the Lord Keeper disallowed the *Scire fac'* yet it was without Cofts, because the Defendant might have Demurred, but did not.

An Assignee can't bring a *Scire fac'* to revive a Decree, unless the Decree be Inrolled.

SIR Harbottle Grimston, Master of the Rolls, died about three o'Clock in the Morning on the second Day of January, in the eighty first Year of his Age, being seized suddenly in the Night with a kind of an Apoplectick Fit, of which he continued ill about four Days, and then dyed; and was about three Days afterwards carried privately out of Town to be Buried at Gorhambury. Upon his Death the Lord Keeper took the Keys of the Rolls into his Custody, until Sir John Churchill was appointed Master of the Rolls, and Sworn privately at his Lordship's House.

D E

Termino S. Hillarii,

36 & 37 Car' II. 1684.

IN CURIA CANCELLARIÆ

Cate 283. *Sir Robert Jafon* versus *Elizabeth Jervis*
 24 Januarii. Widow & al.
 In Court
 Lord Keeper.

A covenants, that in consideration of 1200*l.* he and all claiming under him will convey to *B*, or pay back the Mony. *A* Conveyance is made, and then *B* is evicted by a Jointress, who claimed under a Settlement made by her Husband the former Owner of the Estate. *B* makes the Jointress his Executrix, and dies.

A shall pay back the Mony, and the Executrix of *B* shall have it and her Jointure 100.

NATHANIEL *Bacon*, the Defendant *Elizabeth's* former Husband, who headed the Rebellion in *Virginia*, was Owner of the Lands in Question, and contracts with the Plaintiff *Jafon* to sell him the Lands for 1200*l.* *Jafon* has not Mony to pay for the Purchase; but confesses a Judgment of 4000*l.* Penalty, defeazanced for Payment of the Consideration Mony to *Bacon*; and thereupon *Bacon* conveys the Lands to him and one *Pheasant* his Trustee. *Thomas Jervis* contracts with *Jafon*, *Pheasant* and one *Bucknam* for the Lands for 1200*l.* and *Jafon*, *Pheasant* and *Bucknam* enter into a Statute, that in Consideration of 1200*l.* they and all claiming by, from or under them, or any or either of them, would convey the said Lands unto *Jervis* and his Heirs, free from all Incumbrances done or suffered by them, any or either of them; and that *Bucknam*, who was in possession, should deliver Possession unto *Jervis*, or in default thereof the 1200*l.* was to be repaid.

Bacon dies in *Virginia*, and after his Death his Wife and Children set up a Settlement by which *Bacon* was only Tenant in Tail, and by Vertue of this Settlement they

they evict the Estate from *Fervis*, who afterwards dies, and makes the Defendant *Elizabeth* his Executrix.

For the Plaintiff it was insisted, that altho' there was a general Covenant to convey, yet it was restrained by the special Words that come afterwards, *viz. free from all Incumbrances done by them, any or either of them*: And a Covenant by the Word *concessi*, may be restrained by a subsequent special Covenant: And it appears by the whole Contexture of the Agreement, that the Intent of the Parties was only, that *Fervis* should take *Bacon's* Title, *talis qualis*, and he by a Recovery might have cut off the Remainders, and have made a good Title. And this is a Case of very great Extremity; for the Wife of *Bacon* and her Children run away with the Land by vertue of this Settlement; and she likewise will have the 1200*l.* Consideration-mony, as Executrix to *Fervis*.

Lord Keeper. I take the Covenant to convey to be a general Covenant, and it cannot be supposed, that when a Man buys the Inheritance of an Estate, he intended, that those he bought of should convey an Estate for Life only. And as to the other Objection, that it would be a strange Case for *Bacon's* Wife to have both the Mony and the Land too; there is no Weight in that Objection; for she has an Estate for Life in the Land by the Settlement; and she has the Mony as Executrix to *Fervis*: *Et quando duo jura in uno conveniunt, æquum est, ac si essent in diversis.*

But then the Plaintiffs Council pressed, they might be admitted to try again the Reality of this Settlement, whether it was not fraudulent; the former Tryals having been in *Bucknam's* Name, who was a known Cheat, and his Name cast an Odium on the Cause.

Whereupon it was ordered they should try it next *Affizes* in an Ejectment; and first against the Wife, as to her Estate for
D d d d Life;

A Bond before Marriage to settle a Jointure, and afterwards a Settlement is made which settles the Estate on the Wife and the Issue of the Marriage. Purchasor.

Life; and then as to the Remainders to the Children: For if the Bond before Marriage was only for a Jointure, and the Settlement goes further, and entails the Land upon the Children of the Marriage, the Settlement might be good as to the Jointure, and fraudulent as to the Remainders in Respect to a Purchasor.

This Settlement is good as to the Jointure, but fraudulent as to the Children in Respect of a

Cafe 284.

Preston versus Tubbin.

Eodem die.

In Court.

What shall be reckoned a sufficient *Lis pendens*, and what not.

WHERE a Man is to be affected with a *Lis pendens*, there ought to be a close and continued Prosecution. In this Case the Bill was to compel the Father to perform Articles made on his Son's Marriage; the Father Mortgages the Land, that was to be settled, pending the Suit; and the Mortgagees are thereupon made Parties, and then the Father dies.

Lord Keeper. Here the *Lis pendens* is well enough; for the Plaintiff being Heir, he cannot revive the Suit against himself.

It was said by Mr. *Sollicitor*, that where there is a *Lis pendens*, as if a Man has exhibited his Bill to have Articles performed, there he may by an original Bill affect a third Person with Notice of the first Suit, that shall come in and purchase the Estate pending that Suit; and that there are forty Precedents of it in this Court; for otherwise, tho' a Man has proceeded never so cautiously, and immediately exhibited a Bill to have Articles performed; yet a Stranger may come in, in the mean time, and prevent him of the Estate.

But that was denied by Mr. *Keck*, and by the Court; who said, that with actual Notice you may affect any one by an original Bill; but as to Notice purely by a *Lis pendens*

dens you shall not affect any one, who is no Party to the Suit by an Original Bill; unless the former Cause has Proceeded to a Decree: and there is not that danger in the Case, as Mr. *Sollicitor* apprehends; for if the first Suit be Proceeded in with effect; all Persons that come in *pendente lite* tho' they be no Parties to the Suit, their Interest shall be Bound, and avoided by the Decree in that Cause.

And the Lord *Keeper* said, tho' notice to a Man's Council be notice to the Party; yet where the Council comes to have notice of the Title in another affair, which it may be, he has forgot, when his Client comes to advise with him in a Case with other Circumstances; that shall not be such a Notice, as to bind the Party.

Where Notice to the Parties Council, is Notice to the Party.

Fitton versus Com' Macclesfield.

THE Plaintiff *Fitton* having brought a Bill of Review to reverse a Decree made by the Lord *Chancellor Clarendon*, about 22 Years since, the Defendant the Lord *Macclesfield* Demurr'd, and also Pleded to the Bill of Review.

Upon the Pleadings in the Cause, it appear'd that the Lord *Macclesfield*, in *Easter Term 1661*, Exhibited his Bill, thereby setting forth, that Sir *Edward Fitton* being seized in Fee of the Estate in question, settled this Estate upon himself for Life, Remainder to all his Sons successively in Tail Male, in Case he shou'd happen to have any, with a Remainder to the Lord *Macclesfield*, who was his Nephew, and the Heirs Male of his Body, but subject to a Power of Revocation by Deed or Will. That afterwards Sir *Edward Fitton* made his Will, and thereby devis'd the Lands to the Lord *Macclesfield* in Fee, who therefore pray'd by his Bill to have the Trust of a Term, that was to attend the Inheritance, assign'd to him: and complained that

Case 285.
26 Januarii.

In Court
Lord Keeper.

No Limitation of Time for bringing a Bill of Review; yet after a long Acquiescence under a Decree the Court will not reverse it but upon very apparent Errors.

Fitton

Fitton and the other Defendants pretended to set up several Titles to the Premises.

In Answer to this Bill, the now Plaintiff, Mr. *Fitton*, set forth, that Subsequent to the Settlement in the Bill, Sir *Edward Fitton* made another Settlement, and thereby limited the Estate to himself for Life, Remainder to all the Sons he shou'd after happen to have in Tail Male, with Remainder to the now Plaintiff and his Heirs, but with a power of Revocation by Deed or Will: and that he did not know, that Sir *Edward Fitton* made any such Will, as was pretended, neither was it material, for that the said Sir *Edward Fitton* in his Life-time by Deed Poll, bearing Date the *third* day of *April* 18 Car' 1, Released the Power of Revocation in the last Settlement.

The Cause was heard 13 Jan' 1662, and a Tryal directed to be tried at the *King's Bench Bar*, touching the Reality of this Deed Poll, which upon a long and full Evidence was there found to be forg'd; and thereupon they came back into this Court, and the Will being fully prov'd here by Witnesses, a Decree was made for the Plaintiff the Lord *Macclesfield*, and an Account of Profits directed, and the Deed Poll was ordered to be brought into Court; but a twelve Months time was given to Mr. *Fitton* to try his Title; and in case he shou'd think fit to try the same, an Officer of the Court was directed to attend at such Tryal with the Deed.

Afterwards Mr. *Fitton* within the *twelve* Months brought his Ejectment in the County of *Chester*, and upon full Evidence a Verdict passed for the Lord *Macclesfield*, who thereupon came back into this Court, and the Decretal Order was made Absolute.

In the Bill of Review the principal Errors assign'd were, *First*, That this was a Title proper at Law, and that a Man ought not to be concluded in a Title which concerns
the

the Inheritance, upon a single Verdict, and especially in a feign'd Issue, where the whole Title cou'd not come in Evidence.

Secondly, That the Lord *Macclesfield's* Title was under a Will, and there had never been any Tryal touching the Reality of this Will.

Thirdly, The Plaintiff *Fitton* was sent to Tryal under a great Prejudice; the Deed Poll being called in the Order a Pretended Deed; by reason of which Reflection the Tryal could not be a fair or equal Tryal.

Fourthly, That here was an Account of Profits directed, and a Decree made before any Tryal had, which was preposterous.

Fifthly, That here the Deed Poll was damn'd; whereas some of the Remainder Men, that claim'd by this Deed, were no Parties to the Suit.

To this Bill of Review the Lord *Macclesfield* pleaded and demurr'd.

The Plea was, that Mr. *Fitton*, (tho' he had taken no Notice of it in his Bill) having by the decretal Order twelve Months time given him to try his Title, he afterwards brought his Ejectment in the County of *Chester*, where the whole Title on both sides came in Issue; and that upon a full and long Evidence a Verdict pass'd for the Lord *Macclesfield*, by a Jury of the best Gentlemen in the County.

The Demurrer was, because there was no Error in the Decree; it being grounded upon two Verdicts; and that the Court had a proper Jurisdiction of the Cause; there being a long Term out in Trustees to attend the Inheritance: and that now after 22 Years Acquiescence under the Decree,

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and

and when all the Witnesses to the Will were dead, the Plaintiff ought not to be admitted to his Bill of Review; and especially, for that he had not paid the Costs of the former Suit.

Whether a
Fine and Non-
claim is not a
Bar to a Bill of
Review.

For the Plaintiff it was said, that a Bill of Review is not barred by length of time, (*But by some at the Bar it was said, that a Fine and Non-claim would have been a Bar to the Bill of Review, if Fitton had not been in Prison*) and that the Title was properly a Title to be tried at Law, and yet had never been tried; for as to the Tryal in the *King's Bench*, that was only in a feigned Action, where the Validity of the Will could not come in Question; and they were also sent to a Tryal under a Prejudice; the Deed Poll being called a Pretended Deed: And as to the other Tryal, there was an Ejectment indeed brought; but there Mr. *Fitton* was under the same Prejudice as to the Deed; and he could not make use of the Depositions of some Witnesses that were dead, the Bill and Answer not being brought down: So that in truth the Validity of the Will was never fairly tried; but supposing there had been one Tryal, and a Verdict upon Evidence against Mr. *Fitton*; yet a Title at Law ought not upon that to be perpetually bound up by a Decree of this Court; for that were to make a Verdict in Ejectment as peremptory, as a Recovery in a Writ of Right: but all, that the Court ought to have done in such a Case, had been to have set the Trust Term aside, and have left the Parties to Law: and suppose a Bill was now brought in this Court, suggesting that a Title was disputed at Law, and should pray that for Peace sake a Tryal in Ejectment might be made as peremptory, as a Recovery in a Writ of Right: without doubt a Demurrer wou'd lye to such a Bill.

Secondly, This Decree was unjust, to damn the Deed Poll, because that the Remainder Men were not Parties: And tho' Mr. *Fitton* could not fully prove his Title; yet the

the Remainder Men might; and by that means the Court might be engaged to make repugnant Decrees.

Thirdly, That here an Account of Profits was decreed before any Recovery at Law, and yet at the same time Mr. *Fitton* had a Year's time given him to try his Title, which was preposterous: and an Account of Profits was not so much as prayed by the Bill; and a Decree ought to be but *secundum formam petitionis*: and had the Bill been as general as the Decree, a Demurrer would have lain as to any Relief for an Account.

For the Defendant it was answered, That as to what was objected, that the Remainder Men were no Parties, that was no Error to be assigned by this Bill; because those, that were not Parties to the Decree, could not be barred by it; neither could they have any Bill of Review of that Decree.

Secondly, As to the Objection, that it was a Title purely at Law: that was a Mistake; for there being a Trust of a Term to attend the Inheritance, this Court had undoubtedly a proper Jurisdiction.

Thirdly, That whereas it was objected that the Validity of the Will had never come in Question; that was also a Mistake; for in the Ejectment brought by Mr. *Fitton*, where the Defendant, as well as the Plaintiff, was to make a Title; the Validity of the Will came properly in Question; for the Lord *Macclesfield* could make no Title, but by the Will; the Prior Settlement with a Remainder to him being with a Power of Revocation, the subsequent Settlement to Mr. *Fitton* revoked that; so that upon the Ejectment, not only the Validity of the Will but the Reality of the Deed Poll came again in Question: for had either the Deed Poll been found real, or the Will not well proved; in either Case the Lord *Macclesfield* could have had no Title: and where the Court has a Jurisdiction by reason of a Trust, it has not been unusual to make a Decree upon one Tryal; as in the Case of the
Lord

Lord *Howard*: and this Case is much stronger, the Will having been fully proved in this Court, (for so the Decretal Order is) and also Attempts made to set up a forged Deed, and for that Reason in Sir *Thomas William's* Case, a Decree was made upon one Tryal to damn a forged Deed.

And as to what was objected, that the Decree was larger than the Bill, it was answered, the Bill was upon the whole Case, and Relief prayed in the Premises: and they also insisted on the length of time, and that their Witnesses were dead; as also, that the Plaintiff had not paid his Costs: for tho' the *Lord Keeper* had made an Order to dispense with it, yet that ought to have been set forth in the Bill of Review; which in this Case was not done.

Order for dispensing with Costs upon bringing a Bill of Review, ought to be set out in the Bill.

Per Cur. When a Decree comes to be reversed on a Bill of Review, it ought to be either because it was unjust in matter of Law arising within the Body of the Decree; or for ^{that} the Court wanted, or exceeded, its Jurisdiction: neither of which objections were made out in this Case; for the Court had a plain Jurisdiction by reason of the Trust of the Lease; and without Doubt this Court has a natural Jurisdiction in the Case of *Forgery*; this being the proper Court to detect it in, where you may have time to inspect the Deed, and to sift the Witnesses, which the Proceedings at a Tryal at Law do not admit of: and then the Court having a natural Jurisdiction, it is only matter of Discretion, whether to send it to a Tryal at Law or not; and in Case the Deed Poll had been damned without any Tryal, yet it had not been Error. And it being made out that there was a Forgery in the Case, the *Lord Keeper* said, he did not wonder the Court inserted some Reflections in the Order in *odium* to the Forgery. And as to what was objected, that the Court ought only to have set the Term of Years aside, and to have left the Parties to Law; which is the only material Objection: He said, He did not think the Court

was

was bound so to do. No question but a Bill of Peace to prevent Multiplicity of Tryals is a proper Bill; tho' had the Matter been *Res Integra*, he should not have made altogether such a Decree to have bound the Inheritance, after the Lease expired, upon one Tryal; but he observed, there was the greater Reason for it in this Case; because Mr. *Fitton* declined controverting the Will, and rested upon the Deed Poll for releasing the Power of Revocation: And tho' there was but one Tryal, wherein the Will could properly come in Question; yet he well remembered, that upon the Tryal of the Forgery in the *King's-Bench*, Doctor *Smallwood* was produced, and he there proved the Will: And tho' there be no Limitation of time to the bringing a Bill of Review; yet after *two* and *twenty* Years he should not reverse a Decree, but upon very apparent and flat Errors; especially this Decree having been made by the Lord *Clarendon*, who well understood the Rules of Justice and Equity, (and by Mr. *Keck* no Decree of his was ever yet reversed) and there having been since his time several other *Keepers* and *Chancellors*, and no Bill of Review brought, he did not see Cause after this length of Time, when the Witnesses to the Will were dead, (which whether made or not, is only Matter of Fact) to reverse this Decree; and therefore dismissed the Bill of Review.

A Decree ought not to be made to bind the Inheritance, where there has been but one Tryal at Law.

Morgan versus Dom' Sherrard.

Case 286.

26 Januarij.

A Man possessed of a Term for Years, makes a Mortgage of this Term to *J. S.* and afterwards acknowledges a Statute to the Lord *Sherrard*, and then confesses a Judgment to the Plaintiff *Morgan*.

A Man possessed of a Term for Years, Mortgages it, and then becomes indebted, first by Statute, and afterwards by Judgment, and dies.

The Bill was to have the Equity of Redemption of this Term, which was vested in the Executor, and so become Assets, to be administered in a Course of Administration, and subjected to the Judgment; a Judgment in course of Administration at Law being to be preferred to a Statute.

The Judgment shall be first satisfied out of the Equity of Redemption of the Term.

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For

For the Defendant the Lord *Sherrard* it was insisted, that he had the Statute, and that having got the Term extended in the Hands of the Executor, a subsequent Judgment could not avoid that Extent: And his Council alledged, there was a Case in *Anderfon* to that Purpose: But the Council on the other Side denied there was any such Case.

And the Lord Keeper was of Opinion, that a Term for Years was not extendable by the Conusee of a Statute in the Hands of an Executor; and tho' it be extendable in the Life-time of the Conusor in his Hands, yet the Extent is but *quousque*, and if the Conusor alien the Term before extent, the Statute binds not the Term; and then if it be not extendable in the Hands of the Executor, it is but a Chattel, like a Jewel or a Horse, and there a Judgment must be preferred in course of Law to a Statute.

The Case of *Fuller* and *Guilmore* was admitted, that a Prior Statute extended shall not be avoided by a subsequent Judgment, but that is in the Case of a Freehold, and not as to Goods or Chattels.

Vid. 2. And.
157.
3 Cr. 734 822.
4 Co. 59. B.

Case 287.

Dolin versus Coltman.

3 Februar.
In Court.

The Wife joins in a Mortgage, and levies a Fine to bar her Dower, and in Consideration thereof, the Husband agrees the Wife shall have the Equity of Redemption in lieu of her Dower, and afterwards he makes a second Mortgage.

This Agreement is fraudulent as against

THE Wife joins with her Husband in a Mortgage, and levies a Fine, to the intent to bar her Dower, and in Consideration thereof the Husband agrees the Wife shall have the Redemption of the Mortgage: And the Husband afterwards Mortgages this Estate twice more.

The Court took this Agreement to be fraudulent, as against the subsequent Mortgagees, so far as to intitle the Wife to the whole Equity of Redemption: But in regard the Wife, in Confidence of this Agreement, had levied the Fine, and thereby barred her Dower, and the Husband and Wife being both living, the Court decreed that after the Husband's Decease, the Wife, in case she should

should happen to survive him, should enjoy her Dower: And whereas the Mortgagees pressed, that the Decree might only be, that she should enjoy her Dower, notwithstanding the Fine; the Court thought it unreasonable in this Case to put the Wife to her Writ of Dower; because they might convey away the Estate, and she not know against whom to bring her Writ of Dower. And therefore decreed the Dower to her.

the second Mortgagee; so far as to intitle the Wife to the whole Equity of Redemption; but decreed she should have her Dower, notwithstanding the Fine.

Booth versus Rich.

Case 288.

Eodem die.

In Court.

PER Cur'. There being an Infant in the Case, we can't foreclose him without a Day to shew Cause, after he comes of Age: But the proper way in such a Case is, to decree the Lands to be sold to pay the Debts; and that will bind the Infant.

An Infant can't be foreclosed without a Day to shew Cause. But the proper way is to decree a Sale, and that binds the Infant.

Com' Newburgh versus Bickerstaffe.

Case 289.

4 Februario.

THIS Cause came this Day to hearing; and upon the Pleadings it appeared to be a pure Title at Law, and rested upon this single Point, whether the Marsh Lands in question were Dutchy Lands or not; the Lord *Newburgh* claiming by a Patent under the Dutchy Seal in King *James's* time, and the Defendant *Sir Charles Bickerstaffe* claiming under a Patent in King *Charles the first's* time, granted unto the Duke of *Richmond* under the Great Seal; so that if they were Dutchy Lands, they were well passed to the Lord *Newburgh*; but if not Dutchy Lands, but *De-relict* Lands, then they were well passed to the Duke of *Richmond*; and as to the Jurisdiction of this Court in the Case, it was insisted, that the Plaintiff being an Infant, no Latches should prejudice his Right, and therefore the Plaintiff's Bill, tho' he was an Infant, was proper for an Account of Profits in this Court.

An Infant shall have an Account of Profits against an Intruder, &c. But where there is a Verdict against the Infant's Title, he can have no Account till he has recovered at Law.

The

The Lord *Keeper* observed, that *Littleton* says, if a Man intrudes upon an Infant, he shall receive the Profits, but as Guardian; and the Infant shall have an account against him in this Court, as against a Guardian: But to that it was answer'd, that in this Case a Verdict had pass'd against the Infant; and that binds his Right, as to an account of Profits; and that the Possession was recover'd in the Life-time of the Infant's Father; and in such Case Latches wou'd run upon an Infant; and besides the Plaintiff was not proper for an Account here, until he had first recover'd at Law.

But the Court retain'd the Bill, and directed there shou'd be a Tryal in Ejectment at the *King's Bench* Bar next Term.

Thynn versus Thynn.

Case 290.

9 Februar.

In Court
Lord Keeper.

A Man makes his Will, and his Wife Executrix: the Son afterwards prevails on his Mother to get the Father to make a new Will, and to name him Executor, he promising to be a Trustee only for his Mother.

Trust decreed, notwithstanding the Statute of *Frauds* &c.

THE Case was, that Mr. *Thynn* of *Eagham* Deceased having made a Will, and thereby made his Wife sole Executrix; the Defendant Mr. *Thynn* the Son, hearing of this Will, came to his Mother in the Life-time of his Father, and perswaded her, that there being many Debts, the Executorship would be troublesome to her; and desired that he might be nam'd Executor; for that he by reason of his Privilege of Parliament could struggle the better with the Creditors, and perswaded his Mother to move his Father in it; declaring, that he would be only an Executor in Trust for her: And the Mother accordingly prevails on the Father that it might be so: and thereupon Mr. *Thynn* the Son gets a new Will drawn, whereby a Legacy of 50*l.* only is given to his Mother, and therein he makes himself sole Executor; and cancels the former Will, tho' the Father opposed the doing thereof; and the last Will was read over so low, that the Testator could not hear it; and when he called to have it read louder, the Scrivenor cried, he was afraid of disturbing his Worship. The Defendant having

having thus made himself sole Executor, and procured this Will to be executed, where only a Legacy of 50*l.* was given to his Mother; set up for himself, and denied the Trust for his Mother: and in his two first Answers he denied the Will was drawn by his Directions, and that the 50*l.* therein given to his Mother was without the Testator's Privity; but in his third Answer he confessed it.

Upon the whole Matter, it appearing to be, as well a Fraud, as also a Trust, the Lord *Keeper*, notwithstanding the Statute of *Frauds* and *Perjuries*, tho' no Trust was declar'd in Writing, decreed it for the Plaintiff, and Order'd that the Defendant shou'd be examined on Interrogatories for discovery of the Estate.

Strelly versus Winson.

THERE being *three* Part-owners of a Ship; one of them refuses to fit out the Ship to Sea, and the others do it without his Consent, and the Ship is lost in the Voyage.

Per Cur'. In this Case the Loss of the Ship shall be equally born by all three; for tho' one of the Partners did not consent to the fitting out of the Ship, yet he would have been intituled to one third part of the Freight, and in this Court should have had an Account of the third part of the Profits of that Voyage: and so where one Tenant in Common receives all the Profits, he shall Account in this Court as Bayliff to the other two for two thirds. But in case the other two Part-owners had apply'd to the Court of *Admiralty*, as regularly they ought to have done, that Court wou'd have made an Order, that upon one Part-owner's refusing to Navigate the Ship, the other two should have liberty to do it alone, and shou'd not have been Accomptable to the Part-owner, that refused to join, for any part of the Profits: and there in case the Ship

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had

Case 291.

Eodem die.

In Court.

Lord *Keeper*.

Three Part-owners of a Ship. One refused to Navigate the Ship; and the other two do it against his Consent, and the Ship is lost in the Voyage.

He, that refused to join, shall bear his proportion of the Loss; for he would have been intituled to a share of the Profits, if there had been any.

had been lost, the whole Loss must have rested on those two, that set out the Ship: but in the present Case, in regard the third Person, who refused to join with the other two, would have been intitled to a share of the Profits of the Voyage, if any had been made by the Ship, he ought to bear his Proportion of the Loss. *Qui sentit Commodum sentire debet & onus.*

Case 292.

Hall versus Douthwaite.

11 Februar.

*In Court
Lord Keeper.*

Suggesting prior Incumbrances to Persons living out of a County Palatine will intitle this Court to a Jurisdiction concerning Lands within the County Palatine.

THIS Case concerned Lands within the County Palatine of *Durham*; and in order to intitle this Court to Jurisdiction of the Cause, the Bill suggests prior Incumbrances to Parties, that lived out of the Jurisdiction: but when the Cause came to hearing, no such matter was made out by proof; but it appearing that the Proceedings in the County Palatine had been unjust, the *Lord Keeper* said, he would retain the Cause, and consider of it.

Case 293.

Kettleby versus Atwood.

Eodem die.

*In Court
Lord Keeper.*

Mony agreed on Marriage to be laid out in Land and settled to the use of Husband and Wife, and their Issue, with Remainder to the Husband in Fee.

The Husband dies leaving a Son, who died without Issue. The Heir of the Husband brings a Bill against the Wife, who is Administratrix of her Husband

BY Articles made upon Marriage it was agreed, that the Wife having 1500*l.* Portion the Husband should add 500*l.* more to it, and that the same should be deposited in Trustees Hands, until a convenient Purchase could be found out for investing the same in Land; which Land, when purchased, was to be settled to the use of the Husband and Wife for their Lives, Remainder to the first and other Sons of their two Bodies in Tail, Remainder to their Daughters in Tail, with a Remainder over to the right Heirs of the Husband. And in the Articles there was a Proviso, that in Case the Husband died without Issue, the Wife might make her Election, whether she would have the Land or Mony, and had six Months time to make her Election.

The

The Husband died before any Purchase was made, leaving the Wife *Enfeint* of a Daughter, born soon after his Death, who died at a Month old. The Wife was Administratrix both to her Husband and Child, and made her Election within the *six* Months to have the Mony, and gave notice thereof to the Plaintiff, who was her Husband's Brother and Heir.

The Bill was brought by the Plaintiff to have the 2000 *l.* invested in Lands and settled according to the Articles.

Lord Keeper. Had a Bill been brought in the Life-time of the Infant (it being better and safer for the Infant to have had Land than Mony) I would have decreed the Mony to be laid out for the benefit of the Infant: but I do not see, what Equity the Heir has against the Administratrix. The Bill was dismissed, but without Costs.

Note, this Cause was reheard *Mich. Term. 1687*, by the Lord Chancellor *Jefferies*, who decreed for the Heir.

Vid. Post Case 458.

Dominick versus Langley.

Case 294.

Eodem die.

In Court
Lord Keeper.

THE Case arose upon a Marriage Settlement, wherein there was a Proviso, that in case the Husband should have no Issue Male of the Marriage, but should leave Issue Female, then the Heirs of his Body, or he that should have the Estate by vertue of the Limitations in the Settlement, should pay to such Issue Female 1000 *l.* at 18 Years of Age or Marriage, which should first happen.

The Husband died, leaving Issue Male and Issue Female by his Wife, and the Issue Male died before the Portion to the Issue Female became payable. Mr. *Solicitor*, The Intent of this Settlement is, that in case the Husband died, and there should be no Issue Male of the Marriage living when the Portion became payable, then the 1000 *l.* were to be paid. *Sed non allocatur per Cur.* And the Bill was dismissed.

HIS Majesty King Charles the Second being seized with a violent Distemper, like an Apoplectick Fit, on Monday being Candlemas Day, about Seven of the Clock in the Morning, and Doctor King being accidentally there, immediately let him Blood; but his Majesty continued many Hours in his Fit before he recovered his Senses, and afterwards lay languishing of his Distemper with a kind of an intermitting Fever until the Friday following, when he died between the Hours of Eleven and Twelve; all the Courts at Westminster meeting and sitting about an Hour that Day: And about three o'Clock in the Afternoon of the same Day, King James the Second was Proclaimed, and the Judges, Attorney and Solicitor General having new Commissions, were sworn on Monday following at the Lord Keeper's House, and sat at Westminster the same Day: And on Tuesday the Lord Keeper and the Master of the Rolls sat in Court, the Master of the Rolls administering the Oath to the Lord Keeper.

Case 295.

Anonimus.

UPON a Motion for a Serjeant at Arms on a Commission of Rebellion returned:

Per Cur'. By the King's Demise all Process of Contempt not executed is determined, so that you must begin again at an Attachment; but where any Process is executed, and a *Cepi Corpus* returned, there the Process stands good.

Anonimus.

Case 296.

ON a Motion for a *Supersedeas* to a Prohibition to an Inferior Court, for that the Prohibition was pray'd at the Suit of the Party after he had pleaded to Issue, and by that submitted to the Jurisdiction of the Inferior Court:

Lord Keeper. That is a good Reason why a Prohibition should not go at the Suit of the Party; but where an Inferior Court meddles with Matters out of its Jurisdiction, I will grant a Prohibition for the King in such a Case: But if you bring an Affidavit that the Cause of Action arose within the Jurisdiction, upon that I will award a *Supersedeas*.

Prohibition lyes not to an Inferior Court, after the Defendant has pleaded there; for by pleading the Defendant submits to the Jurisdiction. But at the Suit of the King, Prohibition lyes, tho' the Defendant has pleaded. But if a Prohibition has been granted the Court will deny a *Supersedeas*, unless there is an Affidavit that the Cause arose within the Jurisdiction.

Spalding versus Shalmer & St. Amond & al.

Case 297.

18 Februar.

THE Case was, that *Augustine Spalding*, the Plaintiff's Father, did in April 1666 convey several Manors and Lands lying in *Hutton*, *Blagdon*, *Congresbury*, and *Kingston Seymour* in the County of *Somerset*, to *Alexander Dyer*, *Thomas White* deceased, and the Defendant *Shalmer*, and their Heirs, to the Use of them and their Heirs until they had rais'd by Sales or Profits sufficient to pay the Debts in a Schedule to the Deed of Trust annext, amounting to 1061 *l.* and also to pay 1500 *l.* to one *Codrington*, in case he should convey an Estate in *Hutton* according to Articles made betwixt him and *Spalding* dated 21 March 1653; and after Payment of the Debts, and the 1500 *l.* and all Charges relating to the said Trust, the Trustees were to stand seized of the Remainder of the Lands unfold, to the Use of the Plaintiff, the Son of the said *Spalding*, in

Where Lands are to be sold for Payment of particular Debts, the Purchaser must take Care to see his Purchase Money rightly applied. But if more is sold than is sufficient to pay the Debts, that shall not turn to the Prejudice of a Purchaser.

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Tail

Tail Male, with Remainder to the right Heirs of the said *Augustine Spalding*.

The Trustees enter and undertake the Trust, and in 1668 sell unto *Robert* and *Richard Vccaris* the Lands at *Con-gresbury* for 1500*l.* and sell other Lands at *Hutton* to several other Persons for 772*l.* more, and so raised by Sales in all 2275*l.* and after this the Trustees in 1670 convey the Lands at *Kingston Seymour* to *Nixon* and *Newcourt*, which is mentioned to be in consideration of 840*l.* but no Mony was actually paid, and the Conveyance to *Nixon* and *Newcourt* was only in trust for *Alexander Dyer*: and as touching the 1500*l.* to be paid to *Codrington*, he could not make a good Title, and so the Purchase was broke off; and instead of paying the 1500*l.* to him, there was a Decree made in 1672 that *Codrington* should pay to the Trustees 800*l.* being part of the Purchase Mony, that *Spalding* had advanced in his Life-time; which 800*l.* was accordingly paid; so that now the Trustees had received 3275*l.* Whereas the Schedule Debts amounted but to 1061*l.* and the Receipts and Payments were all Indorsed on the Deed of Trust.

After this, viz. in 1679, *Dyer* the Trustee owing 200*l.* by Bond to the Defendant *St. Amond*, *St. Amond* lends him 200*l.* more, and thereupon the said *Alexander Dyer*, and *Nixon* and *Newcourt* his Trustees, make a Mortgage to the Defendant *St. Amond* of the Lands at *Kingston Seymour* for securing the 400*l.* and Interest, and deliver to him the Deed of Trust, by which he had Notice, that the Trust was only for Payment of the Schedule Debts, which amounted but to 1061, and the 1500*l.* to *Codrington*, and had also Notice by the Indorsements, that the Trustees had raised by Sales before the Conveyance to *Nixon* and *Newcourt* 2275*l.* but it did not thereby appear whether *Codrington's* 1500*l.* were to be paid or not.

Upon the hearing this Cause, the Questions were, how far the Trustees should be charged with this Breach of Trust, and whether *St. Amond's* Mortgage, he coming in with Notice of the Trust, should stand good against the Heir.

For the Plaintiff it was insisted, that all the Trustees were answerable to the Plaintiff for the Breach of Trust, in regard the Deed of Trust was particular, that they should sell for Payment of the Debts in the Schedule only; and when they had raised by the Sale made to *Robert and Richard Viccaris* 1500*l.* that was sufficient to pay the Debts in the Schedule, with an Overplus; and all the subsequent Sales, wherein they all joined, were Breaches of Trust. But as to that it was answered, by the Defendant's Council, that when the Lands at *Hutton* were sold, and the Lands at *Kingston Seymour* conveyed to *Nixon* and *Newcourt*, the Contract with *Codrington* was not broke off; for the Decree was subsequent to those Sales, and it did not then appear but 1500*l.* was necessary to be raised for the carrying on that Purchase. Whereunto for the Plaintiff it was replied, that *St. Amond's* Mortgage was subsequent to the Decree, and he ought to have enquired whether *Codrington* had convey'd the Lands at *Hutton*; for by the Deed of Trust, the 1500*l.* was not to be raised till he had conveyed.

Lord Keeper. Each Trustee shall be charged for no more than he actually received; but where they join in Receipts, there they shall be all charged. And as to *St. Amond's* Mortgage, that was held to be good. Where Lands are to be sold for Payment of particular Debts, the Purchaser must take care to see his Money rightly applied, and if the Debts be not paid, that is such a Breach of Trust as shall affect the Purchaser; but if more be sold than is sufficient to pay the Debts, that shall not turn to the Prejudice of the Purchaser; for he is not obliged to enter into the Account; and the Trustees cannot sell just so much as is sufficient to pay the Debts: And he observed the Deed of Trust

Each Trustee shall be charged for no more than he actually receives. Otherwise, if the Trustees join in Receipts.

Post Case 473: juxta suam contr.

Trust was not only for the Payment of Debts in the Schedule, but also to pay the Trustees their Costs and Charges.

It was then said for the Plaintiff, that 200 l. of the Mony on *St. Amond's* Mortgage was not advanced upon account of the Trust, but was a Debt owing by *Dyer*, and therefore ought not to be charged on the Trust Estate. *Sed non allocatur.*

The Court also directed, that the Monies disbursed by the Trustees for the Maintenance of *August. Spalding's* Children, tho' not within the Trust, should be allowed.

Cafe 298.

24 Februar.

Ante Cafe 230.

Massenburgh versus *Asb.*

THIS Cause upon the former Hearing having been directed to be tried in a feigned Issue in the *Common Pleas*, that so the Validity of the contingent Limitation over of the Trust of the Term to the Plaintiff might come in Issue, *Lord Keeper* declaring that the Trust of a Term in Equity ought to be governed by the same Rule as an Executory Devise of a Term at Law: Afterwards upon a Motion it was ordered, that a Cafe should be drawn up for the *Judges* of the *Common-Pleas* to give their Opinion upon: And the *Judges* having unanimously given their Opinion, that the contingent Limitation over to the Plaintiff was good, for this Reason; because the contingent Limitation was circumscribed, and must happen within the Space of 21 Years: The Cause came now to be heard upon the Equity reserved, and the *Lord Keeper* declared himself fully satisfied with the Opinion of the *Judges*, and decreed for the Plaintiff; and said, he took this Cafe to be the same with the Cafe of *Wood* and *Saunders*, where the Trust of a Term was limited to the Husband for Life, Remainder to the Wife for Life, with a Remainder to their Eldest Son; and if he died leaving Issue, then to that Issue; but in case he should happen to

Trust of a Term limited to the Husband for Life, Remainder to his first Son; and if that Son die

die in the Life-time of the Husband or Wife without Issue, then the Remainder over was limited to another Son of the Husband and Wife; and this Remainder by the Advice of the Judges was held to be good.

leaving Issue, then to such Issue; but if the Son die in the Life-time of the Father without Issue, then to the 2d Son. This Remainder is good.

Stapleton versus Sherrard.

Case 299.

THE Question in this Case was upon the Custom of the Province of *York*, the Husband dying intestate without Issue in the Life-time of the Wife, whether the Wife should have any Benefit of the other Moiety, as Administratrix, by vertue of the Statute of *Distributions*; and the Case of *Crisp* and *Hayes* in the *King's-Bench* was cited, wherein it was said to have been adjudged, that the Legatory part was out of the Custom, and was to be governed by the Statute of *Distributions*. But for the Plaintiff it was said, that in the Case of *Ramsden* and *Gudgeon* in this Court, it was adjudged otherwise; and that by the Custom of the Province of *York*, where the Husband dies without Issue, the Childrens Part ought to go over to the next of Kin; but that was denied by the Council for the Defendant, who said the Custom of the Province of *York* was the same with the Custom of the City of *London*, unless in the Case where the eldest Son has Lands by Descent, he shall have no part of the Personal Estate.

24 Februar.

The Custom of the Province of *York* does not extend to the Testamentary part of the Personal Estate, so that if an Inhabitant within the Province dies intestate, leaving a Wife and no Child, the Wife shall have a Moiety by the Custom, and a Moiety of the other Moiety by the Statute of *Distributions*.

Id. post Case 311, 407, 446.

As to the Matter in Question the Lord Keeper would deliver no Opinion, but ordered, that the Lord Archbishop of *York* should be attended, and desired to certify how the Custom of the Province of *York* was in that Particular.

East India Company versus Evans & al.

Case 300.

25 Februar.

THE Bill was brought by the Company, setting forth their Letters-Patents, and the great Charges they

Bill of *East India* Company against a separate Trader.

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were at in making Leagues with Princes, and building Forts, and maintaining Forces in *India*, and prayed a Discovery what the Defendants had traded for there, and that they might be compelled to bear a proportionable part of the said Charges.

To which Bill the Defendants pleaded, answered, and demurred. They pleaded they were free Merchants, and set forth the Statute 21 *Jac.* against restraining of Trade, and the Statute 9 *Edwardi tertio*, that all Merchants might trade any where, and the Statute 18 *Edw.* 3. that Merchants might trade any where not in Enmity with the King; and averred the *Indians* were not in Enmity: And demurred as to the Discovery, because it was to subject them to a Penalty; and also to that part of the Bill that would inforce them to contribute to the Company's Charge; because it appeared by the Plaintiffs Bill that they denied the Defendants Liberty to trade to *India*, or to have the Advantage of the Plaintiffs Privileges: And by Answer the Defendants denied they traded under the Company's Colours, &c.

For the Defendants it was insisted, that as to what the Plaintiffs prayed a Discovery of, it was to enable them to go on in an Action which founded only in *Tort*, and therefore they ought not to have a Discovery in Equity; and the Discovery would likewise subject the Defendants to great Penalties; for tho' the Company by their Bill waved the Forfeiture, yet they might dismiss their Bill, and would not be bound by that Offer; and besides, that Offer could in no sort bind the *King*, who was intitled to one Moiety of the Forfeiture, and had already brought Informations against the Defendants.

For the Plaintiffs it was insisted, that *Sandyes*, one other of the *Interlopers*, was ordered to admit he had traded to the Value of 1000*l.* and the Company had already recovered against him, by which they had affirmed their Right
at

at Law; and therefore ought to have a Discovery against these Defendants: And as to what was objected from the Statute of King *James*, that related to home Trade only, and not to foreign Trade; and as to the other Statutes of *Edw. 3.* they would not reach this Case; for here was no League of Amity, but only a League of Commerce; and the Defendants have by their Plea said, the *Indians* are not Enemies; but do not say they are at Amity. And as to the Objection, that the Actions brought by the Company founded in *Tort* only, it was a common Case, that a Man shall have a Discovery in this Court in order to enable him to bring an Action of *Trover*, and cited the *Printers Case* in this Court. And as to the Clauses of Forfeitures they were void in Law, and it had been oftentimes adjudged that any Restriction of Trade under Pain of Forfeiture was absolutely void. And as to the Informations brought against the Defendants, they are not brought for the Forfeitures, but for a Contempt to the *King*, and the Defendants Demurrer is improper, for we hope to have Relief here, by a Commission to examine our Witnesses who live beyond Sea, and to have our Possession quieted.

Serjeant *Pemberton* for the Defendants: There is no Precedent in this Court that a Bill might be brought for a Discovery to enable the Plaintiff to bring an Action that sounds in *Tort* only; and supposing the Plaintiffs Patent is a Patent for Regulation of Trade only, yet it is but like a Patent for a new Invention. The Case in *Trover* is founded upon a Right; and tho' the Plaintiffs now say the Clauses of Forfeitures in their Patent are void, yet I know that lately in *Mr. Boome's Case* in the *Common-Pleas* they made use of those Clauses in this Patent, to justify a Seizure of Goods.

Lord Keeper. Clauses to restrain Trade under Forfeitures have been adjudged void above 20 times; so that Matter is out of the Case; and it is a Mistake to say a Man shall

Clauses in a Charter to restrain Trade under a Forfeiture, void.

Clause in a
Charter to re-
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Bill of Discove-
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Matters found-
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not have a Discovery in this Court for Matters that found in Tort; and cited the Case, where a Man carried his Mine under his Neighbour's Ground; and the Case, where a Man run away with a Casket of Jewels, he was ordered to answer, and the injur'd Party's Oath allow'd as Evidence in *Odium spoliatoris*: and it seem'd to him a strange Demurrer, to say they are not to contribute to the Charge of the Company, because they were Wrong-doers. And this was but a Charter for regulating of Trade, and there had been many Patents for that Purpose, soon after the making of the Statute of 21 Jac. which had never been thought illegal, nor complained of in any Subsequent Parliament. And therefore his *Lordship* over-ruled the Plea and Demurrur, and ordered the Defendants to answer the Bill.

Case 301.

25 Februar.

In Case of Abatement it is not necessary to revive against a Defendant, that has not answered.

Oxburgh versus Fincham.

DEMURRER to a Bill of Revivor, because the Plaintiff had not reviv'd against all the Defendants. *Per Cur'*. It is not necessary to revive against a Defendant, that has not answered.

Case 302.

Eodem die.

A Bill to examine Witnesses in *Perpetuam rei memoriam* is not proper until the Party has established his Right at Law. *Vol. Post Case 303.*

Pawlett versus Ingres.

ONE Commoner had brought an Action on the Case against another Commoner, for oppressing the Common, and had recovered 10*l.* Damages. The Bill was brought by the Defendant at Law to examine his Witnesses to prove his Right of Common in *Perpetuam rei memoriam*.

If one Commoner brings an Action against *A. B.* for oppressing the Common, or for using the Common where he ought not, and recovers 1*s.* or 0-

Per Cur'. Such a Bill is not to be admitted in this Court. A Commoner ought not to come here, to prove his Right of Common, until he has recovered at Law in Affirmance of his Right: but if the Bill had been, that one Commoner had recovered 1*s.* or other small

small Sum for Damages against the Plaintiff for oppressing the Common, or for using the Common where he ought not, and therefore that the other Commoner might accept of like Damages for what was past, to prevent Charges at Law; *That* had been in the Nature of a Bill of Peace, and had been a proper Bill in this Court.

ther small Sum for Damages, and afterwards another Commoner brings the like Action against A. B. he may bring a Bill in Equity, that the Plaintiff in such Action may accept the like Damages.

Norton versus Sprig.

Case 303.

27 Februar.

UPON arguing Exceptions to the Masters Report the Question was, how far the second Husband should be charged of his own Estate, for a *Devastavit* and Breach of Trust, committed by the Feme, and her first Husband.

How far the second Husband is liable to a *Devastavit* or Breach of Trust of the Wife and her first Husband.

Per Cur'. Where there is a Bond there is a *Lien* by Deed, and so the second Husband bound; but where there is barely a Breach of Trust or Debt by Simple Contract, there in Equity the Plaintiff ought to follow the Estate of the Wife, in the Hands of the Executor of the first Husband.

Grice versus Banke.

Case 304.

Eodem die.

THE Court of Judicature for rebuilding Houses burnt down by the great Fire in *London*, having settled the Rent, which the Tenant was to pay for the House in Question, *viz.* 5 *l. per Ann.* and there being an ancient Rent of 1 *l.* 5 *s. per Ann.* issuing out of the same House to a Charitable Use, and which was now 20 Years in Arrear, the Question was whether the Landlord or Tenant should pay this Rent.

Upon reading the Act of Parliament, the *Lord Keeper* was satisfied the Tenant was in no Case to be charged with more than the Rent of 5 *l. per Ann.* in the whole; and directed

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the Plaintiff to bring the Lady *Dorset*, who had the Reversion expectant on the Lease, before the Court; and ordered the Tenant not to pay any more of his Rent in the mean time, and declared that the growing Payments and the Arrears of the 1 l. 5 s. a Year ought to be deducted out of the Rent.

Cafe 305.

28 Februar.

Pritman versus Pritman.

A Decree of Dismission may be pleaded in Bar to a new Bill, tho' it is not Signed and Enrolled.

A Former Decree of Dismission being pleaded in Bar, it was objected, that the Dismission and Decree could not be pleaded in Bar, because the Decree was not Signed and Enrolled; and if the Defendant would have it that it was a Suit still in being, then the Plea was a Plea in Abatement only.

Per Cur'. Either that Suit was for the same Matter as the present, or not; if not, you ought to have moved to have had the Plea referred; but if it is, then that Suit is either depending or determined, and either way is pleadable.

Cafe 306.

Eodem die.

Demurrer for not making Oath of the Loss of a Deed whereof a Discovery is sought by the Bill.

Nicholson versus Pattison.

THE Bill suggested the Defendant had got into his Custody a Writing purporting an Agreement betwixt the Plaintiff and Defendant, and prayed he might set it forth; and suggested further that the Plaintiff had paid the Defendant the Money due, and yet he threatened to take out Execution.

As to the first part of the Bill the Defendant demurred; because the Plaintiff had not made Oath of the Loss of the Writing; and by his Council it was insisted, that the Plaintiff himself had this Writing, but had razed it since the executing of it, and so by his own Act has destroyed his

his own Remedy at Law, and therefore ought not to be aided in Equity. *Sed non allocatur per Cur'.*

Naylor versus Cornish & al' Civit. Lond. Case 307.

Eodem die.

THE Bill was to be relieved touching a Debt due from the Chamber of *London*, under the common Seal of the City, and was brought against the old Mayor and Aldermen, and the now Commissioners; and the Bill charges, that ~~who~~ the King had obtained Judgment against the City in a *Quo Warranto*, yet he had been graciously pleased to declare, that he would take no Advantage of the Forfeiture of their Lands; but had granted the Lands to the Defendants as Commissioners to receive the Profits in trust to pay the City Debts, and that there was a Chamberlain appointed (named in the Bill) and the Plaintiff had likewise made Mr. *Attorney General* a Party, charging that he did not oppose the Payment of the Plaintiff's Debt.

While the Judgment against the Charter of *London* was in Force, a Bill brought for a Debt due from the Chamber of *London* against the old Lord Mayor and Aldermen and the Commissioners.

The Defendants demurred, for that they were not liable in their private Capacities, nor did they receive any of the Rents or Profits of the City Lands as Citizens of *London*, nor upon Trust to pay the Debts of the City.

For the Defendants it was insisted, they acted by Commission, and were only in nature of Managers, and accountable to the King only, and acted only during his Pleasure.

The *Lord Keeper* ordered the Defendants to answer, but said the Plaintiff had but a melancholy Reckoning, there being a Debt of above 150000*l.* due to the Orphans, which was to be preferred in Payment.

Case 308.

Gell versus Hayward.

Eodem die.

Upon a Bill to perpetuate the Testimony of Witnesses touching a Right to a Way, the Plaintiff must set out the Way exactly in his Bill *per & trans*, as he ought to do in a Declaration at Law.

BILL to examine Witnesses to perpetuate the Testimony of Witnesses touching a Right to a Way. The Defendant demurred; because the Plaintiffs had not set forth by their Bill the Way they claimed with sufficient Certainty.

Lord Keeper. If you have not laid the Way in your Bill exactly *per & trans*, as you ought to do in a Declaration at Law, I will allow the Demurrer, for Uncertainty. But upon reading the Bill it appeared to be laid certain enough.

But such a Bill ought not to be brought for such trivial things as Right of Common, or for Ways or Water-courses; or at least not till after a Recovery at Law.

Vid. ante Case 302.

Then the *Lord Keeper* said, he would not allow Examination in *perpetuam rei memoriam* for such trivial things as Right of Common, or for Ways, or Water-courses; or at least not till after a Recovery at Law; for that the Examination costs more than the Value of the thing: And in the present Case, the Plaintiff is either disturbed in his Way, or he is not; and if he be, he has his Remedy at Law; and if he be not, he has no Reason to complain: But for the Plaintiff it was said, that the Bill charged the Plaintiff's Tenant was in Combination with the Defendant, and would not suffer the Plaintiff to bring an Action in his Name.

Case 309.

Norris versus Bacon.

Eodem die.

Solicitor brings a Bill for his Fees. Plea of Stat. 3 *fac.* that the Plaintiff had not Signed his Bill. Good Plea.

A Solicitor brought a Bill in this Court for his Fees. The Defendant pleaded the Statute 3 *fac. ch. 6.* that the Plaintiff had not Signed his Bill, and the Plea was allowed.

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Termino Paschæ,

I Jacobi II. 1685.

IN CURIA CANCELLARIÆ.

Grant verſus Stone.

Caſe 310:

IT was moved on behalf of the Plaintiff, that he having enter'd into a Recognizance by Order of the Court, that the Defendant endeavoured to arreſt him upon it at Law; whereas by the Courſe of the Court, he ought to bring a *Scire fac.* only.

An Action at Law will lie upon a Recognizance; but if it is entered in to in Purſuance of an Order of this Court, the Court will not allow it to be ſued otherwiſe than by a *Scire fac.* in this Court.

For the Defendant it was ſaid, that a Recognizance is ſuable, as well at Law, as in this Court; and the Defendant had choſe to bring an Action upon the Recognizance, to the Intent he might hold the Plaintiff to Bail.

Lord Keeper. A Recognizance is ſuable in the Courts at Law, either by an Action to be brought on it, or more properly by an Original in the *Common Pleas*; but this being a Recognizance enter'd into by Order of this Court, I will not allow it to be ſued otherwiſe than by a *Scire fac.* in this Court.

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Stapleton

Case 311.

7 Maij

Stapleton versus Sherrard.

Ante Case 299.
Post Case 407.
 446.

THIS Cause came before the Court, upon Exceptions taken to the Certificate of the Lord Archbishop of *York*, to whom, upon the hearing of the Cause, the Lord Keeper had referr'd it, to certify how the Personal Estate of an Inhabitant of the Province of *York*, who dies without Issue intestate, leaving a Widow, ought by the Custom of the Province of *York* to be distributed. The Certificate was, that after Debts and Funerals paid, one Moiety of the Personal Estate belonged to the Widow, and that the other Moiety had been usually distributed amongst the next of Kin.

Ante Case 195.

For the Defendant, the Widow of the Intestate, it was argued, that the Custom of the Province of *York*, where a Man dies without Issue intestate leaving a Widow, extends only to one Moiety of the Personal Estate, which the Wife is to take by the Custom; and the other Moiety is clearly out of the Custom, and left to go in a Course of Administration, and is to be govern'd by the Statute for the Distribution of Intestates Estates; and the Widow the Administratrix will be intitled to have her Share of the other Moiety, according to the Statute: And it is unreasonable to believe, that there is any such Custom as is pretended, for the Custom does *privare Communem Legem*. As to so much of the Personal Estate as the Custom reaches, That is bound by it, and no Devise of the Party can prevent it. And if the Custom is, as it is here certified, it will follow, that where a Man has Children, there he may by Will dispose of one third Part of his Personal Estate, but when has none, he can't devise one Penny; for by the Custom one Moiety is to go to the Wife, and the other Moiety to the next of Kin: so that the whole is bound: and if this be so, the Custom has a greater Respect to remote Relations, than it has to a Man's own Children; for

for the Children can claim but a third Part by the Custom, but the next of Kin shall have a Moiety.

For the Plaintiff it was said, That an Inhabitant of the Province of *York* may dispose of his Estate as he will, in his Life-time; and that this Custom is only, where a Man dies intestate; and therefore it cannot be said to be unreasonable, that when a Man is surprized, and has not time to make a Will, that one Moiety of his Estate should be distributed amongst the next of Kin; and cited *Crispe's Case* in *B. R.* that where a Citizen of *London* dies Intestate, his whole Estate, as well the Legatary Part as the Residue, is governed by the Custom, and that no Part of it is touched by the Statute of Distributions of Intestates Estates.

Lord Keeper. I take it that the whole is govern'd by the Custom; and the Usage of the Spiritual Court, (which is here certified by the Archbishop) is great Evidence of such a Custom; and I do not believe that the Act for Distribution of Intestates Estates, intended that the Wife should have more than a Moiety: and he said he took it, that the Statute of *H. 8.* leaves the Ordinary at Liberty, to grant Administration either to the Wife, or next of Kin: But it was said by Mr. *Solicitor*, that the Courts at Law would prohibit the Spiritual Court from granting Administration to the next of Kin, where there was a Wife; and cited the Cases of *Thompson* and *Butler*, and * *Sir George Sands's Case* in *B. R.* where Prohibitions were granted in such Cases: But the *Lord Keeper* was of Opinion, that if such Prohibitions had been granted, it was against the Act of Parliament, which expressly leaves it to the Ordinary's Discretion to grant Administration either to the Wife or the next of Kin.

* 1 Sid. 172.

Case 312.

8 Maij.

Mortgagee or Trustee manages the Estate himself, he is not to be allowed for his own Care and Pains. Otherwise if he employs a Bayliff.

Bonithon versus Hockmore.

IN an Account before the Master, the Plaintiff, who had married the Defendant's Mother, and had a Debt upon the Estate, was allowed by the Master great annual Sums of Mony for his Care and Pains in managing of the Estate.

Per Cur'. Where a Mortgagee or Trustee manage the Estate themselves, there is no Allowance to be made them for their Care and Pains; but if they employ a skilful Bayliff, and give him 20 *l.* *per Ann.* that must be allowed, for a Man is not bound to be his own Bayliff.

Case 313.

Eodem die.

In Court
Lord Keeper.

Lessee for along Term of Years covenants to lay out 200 *l.* upon the Premises within the first 10 Years; he fails to do it; and after 30 Years were expired, Lessor brings Action of Covenant, and recovers 150 *l.* Damages. Equity will not relieve.

Barker versus Holder.

THE Plaintiff being a Lessee at 40 *l.* a Year, Covenants to lay out and expend on the Premises 200 *l.* within 10 Years; he fails to do it; and when 30 Years of the Lease are expired, the Defendant brings an Action on the Covenant; and about 30 *l.* being proved to have been laid out, recovers 150 *l.* Damages.

The Bill was to be relieved against this Verdict, in regard the Damages were excessive, or at least that the 150 *l.* might be decreed to be laid out on the Houses; for the Plaintiff ought to have the Benefit of it during his Lease.

Lord Keeper. I think that the Jury dealt very hard with Mr. Barker, to give such great Damages, and to put him upon making a precise Proof, that the whole 200 *l.* was laid out, when it ought rather to have been presumed, it was; the Defendant having brought no Action in 20 Years time after the Mony ought to have been laid out;
but

but the Jury having thought fit to give such Damages, there is no ground for me to mitigate them, nor to decree the Monies to be laid out on the Premises; for if it had been laid out when there was thirty or forty Years to come in the Lease, the Lessee would have taken Care to have laid it out in lasting Improvements, which it may be, now his Lease is near out, he would not do; and therefore dismissed the Bill.

Tunstall versus Oxenbridge.

Case 314.

9 Maj.

THE Plaintiff by his Bill demanded an Account of the Personal Estate of Sir *John Tunstall* his Grandfather, and of the Personal Estate of his Grandmother, who both died intestate, and several Administrations had been granted of their Estates; and now *Oxenbridge*, the Plaintiff's Uncle, had obtained an Administration *de bonis non*; but all these Administrations, as the Plaintiff by his Bill alledged, were a Trust for the Children of the Plaintiff's Father's eldest Brother, who had assigned their Interest to him; and the Plaintiff thereupon had now procured an Administration *de bonis non* to himself; and the Plaintiff by his Bill sought also to be let into a Tenant Right of a Church Lease, that was enjoyed by his Grandfather, but had been twice renewed by the Defendant: And whereas the Plaintiff's Council would have it that this Lease was a Lease for Years determinable on three Lives, and so went in a Course of Administration, it was answered, that it was an absolute Lease for three Lives, and not for Years determinable on three Lives, as they would fancy, for being held of the Dean and Chapter of *Westminster*, they had Power only to demise for three Lives or 21 Years, and could not make a Lease for 99 Years determinable on three Lives, and so Plaintiff's Administration gave him no Title to a Tenant Right, if any there was; and then for the Plaintiff it was insisted, that he had an Assignment of the Interest of the Heir at Law.

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Lord Keeper. If you would be relieved in that respect, you ought to have set forth the Assignment, and grounded your Bill upon it, which you have not done; so that your Bill is defective in that Point: And besides, the last Life died so long since as in 1649, and the Defendant hath renewed the Lease twice since that time. *Adjournatur.*

Durbaine versus Knight.

Case 315.

Eodem die.

In Court.

Feme sole brings a Bill, and pending the Suit marries, and Baron and Feme bring Bill of Revivor, and obtain a Decree with Costs; they shall have Costs for the whole Suit, excepting only the Bill of Revivor.

A Feme sole exhibits her Bill, and pending the Suit Intermarries: The Baron and Feme bring a Bill of Revivor, and obtain a Decree with Costs.

The Question was whether they should have Costs of the whole Suit, or only from the Bill of Revivor.

Lord Keeper. This is not like a Revivor against an Heir or Executor, where the Suit is abated by Death; in that Case they shall answer only for their own time: But here all Proceedings stand in *Statu quo*, and it is unreasonable there should be such an Abatement. And in case the Defendant had been a Feme sole, and intermarried, *that* should not have abated the Plaintiff's Suit; and in this Case the Abatement was by the Party's own Act.

The Court ordered the Costs of the whole Suit, deducting only the Charge of the Bill of Revivor; which was thought hard in these two Respects; *first*, that the Abatement was by the Party's own Act; *secondly*, that had the Defendant been in the right, and so ought to have had Costs, yet he could not have compelled the Plaintiffs to revive.

Anonimus.

Case 316.

Whether a *Subpoena* served and a Bill filed is a *Lis pendens* against all Persons.

THAT a *Subpoena* served, and Bill filed, is a *Lis pendens* against all Persons; but the Service of a *Subpoena*;

pæna, without a Bill's being actually filed, makes no *Lis pendens*; but the Bill being filed, the *Lis pendens* comes from the Service of the *Subpæna*, tho' it be not returnable till the next Term, and tho' the Party lives never so remote; for otherwise a Man upon the Service of a *Subpæna* might alien his Lands, and prevent the Justice of this Court: but that being by the Council observed to be a hard Fiction in Equity to bind Purchasors; it was proposed that some Course might be taken, by having some publick Record or Calender kept, whereunto Purchasors might have Resort, and see what Lands are in demand in this Court, as they may at Law in Case of *Fines. Cur' advisare vult.*

Agreed it is not, if there is only a *Subpæna* served, and no Bill filed.

Dunch versus Kent.

Case 317.

11 Maij.

THIS Cause coming now before the Court, upon the Master's special Report, who had reported, that the Assignments made by *Lindsey* to the Defendants, purported to be in Consideration of Debts due and owing by *Colvile*, yet in Truth they were not *Colvile's* Debts, but *Lindsey's* Debts:

Ante Case 253.

Per Cur'. Tho' the Creditors of *Colvile* did not come in within the Year, yet this Patent was a Trust for them, and was special Assetts, and not convertible to other Purposes by *Lindsey*, who married his Executrix; but *Lindsey*, after the Year, ought to have prefer'd his Bill, to have compelled the Creditors to have come in, or otherwise to renounce the Trust; and *Lindsey* having not so done, but assigned to Creditors of his own, that were not Creditors of *Colvile*; That was a Breach of Trust, and void, as against *Colvile's* Creditors. And tho' it was objected, that *Lindsey's* Creditors had made over their Assignments to other Persons, who came in as Purchasors without Notice, for full and valuable Considerations; Yet, *Per Cur'*, Such Purchasors came in under the Letters Patent, in which the

Trust

Trust is mentioned, and they ought to have taken Notice of it at their Perril.

Case 318.

Zouch versus Swaine.

Eodem die.

A draws in B, a Young Gentleman, to sell his Estate at a great Undervalue, with Covenants from B for A's quiet Enjoyment. A is evicted, and brings Action on the Covenants. B relieved in Equity upon Payment only of the Purchase-Money and Interest, and not left liable at Law to answer the Value of the Land upon the Covenant.

THE Defendant had drawn in the Plaintiff, a Young Man, and purchased an Estate of him at a great Undervalue; and it happened, that the Title was defective, and the Defendant had been evicted; and there being Covenants for quiet Enjoyment, and other Securities entered into by the Plaintiff, he now came to be relieved against an Action brought on these Covenants: And for the Defendant *Swaine* it was insisted, that he ought to have the Value of the Estate evicted. *Lord Keeper*, The Defendant, who was a Lawyer, and ought to have understood a Title, purchased this Estate at a great Undervalue; and the Title now proving defective, and the Land evicted, it is unreasonable he should make an Advantage of this catching Bargain; and therefore decreed him his Purchase-Money with Interest only, discounting Mesne Profits.

Case 319.

Seymour versus Fotherly.

*In Court
Lord Keeper.*

One has two Sons, and on the Marriage of his eldest Articles to settle Land on the Eldest Son and his Wife for their Lives, with Remainder to the first &c. Son in Tail Male successively, Remainder in Fee to the Son. *Father being dead* Bill to be relieved against the Articles, as gain'd by Surprise, and that

THE Father, on the Marriage of his Son with the Plaintiff's Daughter, in Consideration of 4000*l.* Portion, which the Father was to receive, Articles to settle Lands to the Use of the Son for Life, Remainder to the Wife for a Jointure, Remainder to the first and other Sons of the Marriage in Tail Male, Remainder to the right Heirs of the Son.

The Bill was to discover the Value of the Estate, and what Incumbrances might be upon it, and to have the Articles performed. The Defendant having another Son, insisted, he was surprized in the Articles, and intended that in Default of Issue Male of his eldest Son, his Estate should

Insists

should have come to the Second Son, charged with Portions for Daughters, and would have had the Court Interposed, that the Settlement might have been so made. *Sed non allocatur.*

it was intended to limit the Remainder to the second Son, on Failure of Issue of the first. *Sed non allocatur.*

Lady Pawlett versus Lord Pawlett & al.

Case 320.

13 Maij.

Ante Case 201.

JOHN Lord Pawlett, by Indentures of Lease and Release 7 & 8 Maij 1679, conveys several Manors and Lands to Trustees and their Heirs, to the Use of himself for Life, without Impeachment of Waste, and after his Death to other Trustees for the Term of 500 Years, upon the Trusts therein after declared, and then limits several Remainders over. The Trust of the Term for 500 Years was declared to be for raising Monies by Rents and Profits, or by Leases, to be derived out of the Term for 500 Years, in the first Place to pay the Lord Pawlett's Debts, as also such yearly Maintenance for every younger Son and Daughter as was therein after expressed; and after Payment of his Debts, and such Maintenance as aforesaid, then to pay all such Sums for all and every younger Son and Daughter, as the said Lord Pawlett had or should have, and at such Time and Times and in such Manner, as he should by Writing or by his last Will appoint; and in Default of such Appointment, the Trustees should in convenient Time after such Debts as aforesaid should be satisfied, and not before, raise and levy out of the Premises 4000*l.* a-piece for each and every younger Son, and 4000*l.* a-piece for each and every Daughter of the said Lord Pawlett on the Lady Susanna his second Wife begotten, payable at *One and twenty* or Marriage, which should first happen; with this further, That in case the said Lord Pawlett should not otherwise direct by Will, every younger Son and Daughter should be allowed such competent Yearly Maintenance and Education, as should be thought requisite, till the Portions

N n n n

should

should be respectively paid, so as such Maintenance did not exceed 150 *l. per Ann.* for a Son, and 100 *l. per Ann.* for a Daughter; and after the Performance of these Trusts, (and some other Trusts therein mentioned) the Trustees were to surrender so much of the *five hundred Years Term* as should remain, to whom the immediate Reversion should belong.

The Lord *Pawlett* by his Will the 29 *May* (79) devises to his two Daughters by the said *Susanna* his Wife 4000 *l.* a-piece for their respective Portions, to be raised and paid to them respectively in such Manner, as in the said Indenture is directed; and further Wills that they should have the same Yearly Maintenance, until their respective Portions should be raised, as by the said Indenture was appointed. Provided that by Vertue of his Will, or of the said Indenture or otherwise, all put together, his Daughters should not have more than 4000 *l.* a-piece for their Portions; unless his Son and Heir apparent should happen to die without Issue, and then they should have 2000 *l.* a-piece more.

The Lord *Pawlett* dies, leaving Issue by the Lady *Susanna* one Son, *viz.* the Defendant the Lord *Pawlett*, and two Daughters, *Susanna* and *Vere*. Before any Part of the Portion of *Vere* could be raised, she (12 *December* 1681) dies under Age, and unmarried; and Administration of her Estate is granted to the Plaintiff her Mother, who brings her Bill against the Heir and the Trustees, to have the said Legacy of 4000 *l.* and Interest for the same from the Death of *Vere*, raised out of the Trust-Estate.

This Matter coming on this Day to be argued upon a Case stated specially by a Master, the sole Question was, Whether, as this Case is; the Lady *Susanna* is entituled to have the 4000 *l.* and Interest raised out of the said Estate.

For

For the Plaintiff it was insisted, *first*, that the 4000 *l.* was *debitum in presenti*, but payable *in futuro*, and therefore being an Interest vested, it ought to go to the Administratrix.

Secondly, that this 4000 *l.* is a Duty arising by the Will, and is in the nature of a Legacy; for the Deed was to take place only, in case the Lord *Pawlett* had made no Appointment by his Will; and in all Cases of Construction, Equity ought to favour the Right that goes in a course of Administration: And tho' now the Case falls out to be between the Mother and the Heir at Law; which of them shall have the benefit of this 4000 *l.* and the Plaintiff's Council would draw an Equity from thence in favour of the Heir; whereas it might have so happened, that the Son might have died in the Life-time of his Sister, and then the Controversy would have been between the Mother and the half Sister; and there ought to be the same Rule in both Cases: And suppose this Portion had been made payable at 21 only, and the Daughter had married and died under 21, leaving Children, it would be hard by a Construction in Equity to deprive the Daughter's Children of this 4000 *l.* and it was urged that the Deed being penned, that after all Portions paid, the Lord *Pawlett* should have the Estate, it was not thereby meant that he should have it before all the Portions were raised and paid.

For the Defendant it was insisted, that the Case depends upon the Deed, and not upon the Will, which only confirms the Deed, and is a Case purely in Construction, and a Matter of Trust, and therefore Equity ought to favour the Heir in such a Case; and the Case of *Bond* and *Brown* was cited as a Case in point, which was decreed last Term by the Lord Keeper in Favour of the Heir; and what was principally relied upon was, that this was not a Legacy, nor did arise by the Will; for then it was admitted it must have gone in a course of Administration; but the Duty arose upon the Deed, and was given under the notion of a Portion, and not as a Legacy, and a Maintenance

nance is appointed in the mean time; and it was not intended that the Daughter should dispose of or have any Interest in the 4000 *l.* till Marriage, or 21.

Lord Keeper. This is a Case both great in Value and in its Consequence, and I find no Precedent on either side; the Case of *Bond and Brown* being a new Case, and decreed but last Term, is not to be urged as a Precedent. As to a Legacy devised by a Will, I take the Law to be settled, that where it is *Debitum in presenti*, tho' not payable till a future Day, it shall go in a course of Administration; and the Reason is, that it takes place on the Personal Estate, and depends purely on a Will, which is to be construed and expounded in the Spiritual Court; and in such case it is but just that the Legacy should go in a course of Administration, in regard it comes out of the Personal Estate; and it is indifferent, whether the Executor of the first or the last takes it: And so it is where a Sum of Money is by Will only devised payable out of Land; because it has been looked on as a Legacy; But where it stands upon a Deed only, as I take it, it does in this Case, the Will being only a Confirmation of the Deed (and so it would have been if the Lord *Pawlett* by Deed had only raised a Trust for Payment of such Portions as he by Will should appoint) the Case is quite of another Consideration: And here the Plaintiff has no Title at Law, neither is there any Demand according to the Letter of the Deed; but the Plaintiff would have the Trustees decreed to raise a Portion, which according to the Letter of the Deed never became payable, and wou'd have me force a Construction in Favour of the Plaintiff the Lady *Pawlett*, in Prejudice to the Heir at Law; But I see no Reason to Decree for the Plaintiff; and the rather, for that the 4000 *l.* is to come wholly out of the Lands, and the Personal Estate no way subjected or made liable to the Payment of it by the Will: And therefore the Bill must be dismissed.

Note, this Decree was affirmed upon an Appeal to the House of *Lords*.

Preston

Preston versus Jervis.

Case 321.

19 Maij.

Lord Keeper.

THE Case was, that the Defendant's elder Brother in 1665 sold Lands, of the Nature of *Borough English*, to the Plaintiff's Mother, which belonged to the Defendant; the elder Brother apprehending then, as is pretended, that the Defendant was dead. The Plaintiff's Mother took a Bond from the elder Brother, to indemnify her against the Defendant's Title; for the Lands lying in *Kent* are presumed *prima facie* to be *Gavel Kind*: And in truth, as it appeared, and was proved in the Cause, the younger Brother having Notice that his elder Brother had thus sold his Lands, they came to an Agreement, by which the elder Brother was to pay the Defendant an Annuity, which was equal to the Annual Value of the Lands, and so he suffered the Plaintiff's Mother to enjoy her Purchase whilst the elder Brother lived, but he being dead, the Defendant brought an Ejectment to evict the Plaintiff, who claimed as Heir to his Mother, and thereupon brought his Bill to be relieved.

Lands lying in *Kent* are *prima facie* presumed to be *Gavel Kind*.

And in regard the Land was sold in 1665, and the younger Brother in 1674 came over into *England*, and, after he had Notice of the Sale, had accepted an Annuity of his elder Brother, and suffered the Plaintiff's Mother to enjoy, without calling her Title in question during all the Life-time of his elder Brother; (whereas if he had so done, the Plaintiff's Mother might have taken Advantage of her Collateral Security, which was now of no Value, the elder Brother having left no Assets;) and it being also proved that the elder Brother suffered some other Lands to descend upon, and come to the Defendant, which he might have prevented, it was decreed that the Defendant should make good the Plaintiff's Title, and surrender and release the Lands to the Plaintiff and his Heirs.

Case 322.

Kenge versus Delavall.

20 Maij.

Lord Keeper.

A Woman living from her Husband, and having a separate Maintenance, contracts Debts; the Creditors by a Bill in this Court may follow the separate Maintenance whilst it continues; but when that is determined, and the Husband dead, they can't by a Bill charge the Jointure with those Debts.

SIR Ralph Delavall and his Lady, by reason of some Discontents in the Family, agree to live a-part, and there was a separate Maintenance settled on the Lady, but determinable on either of their Deaths. The Lady contracts several Debts to the Plaintiff and others during the Separation. Sir Ralph dies, and the Bill is to subject the Defendant's Jointure to the Payment of the Plaintiff's Debt.

Lord Keeper. Had the separate Maintenance continued, there might be some Reason for the Creditors to follow that, and make it liable to their Satisfaction; but that being determined by the Death of the Husband, I don't see which way the Jointure can be charged with it; and the rather for that the Executor of the Husband, who may have paid the Debt, is no Party to the Suit. I overruled the Demurrer indeed, because I would have the Case before me with all its Circumstances, but now I see no Equity, and therefore the Bill must be dismissed.

Case 323.

Whitmore versus Weld.

26 Maij.

In Court
Lord Keeper.

2 Vent. 367:

2 Ch. Rep.

167.

Post Case 343.

Devise of a Personal Estate to a Trustee in Trust for Testator's only Son, and the Heirs of his Body; and if his Son die during his Minority, and without Issue, then

THE Case arose upon the Will of Mr. *Whitmore*, who by Will, dated 18 Jan. 1675, devised the Surplus of his Personal Estate, being of the Value of 30000*l.* to the Lord *Craven*, during the Minority of *William Whitmore* the Testator's only Son, for the Use of him and his Heirs lawfully descended from his Body, and to the Use of the Issue Male and Female descended from the Bodies of his Sisters *Eliz. Weld* deceased, *Margaret Flemish* and *Anne Robinson*, in case his Son died during his Minority without Issue, and made his Son Executor, and the Lord *Craven* Executor during the Son's Minority. The Testator died

in

in 1678, his Son being about the Age of 13, and the Lord *Craven* proved the Will during the Minority of the Son; and afterwards the Son died without Issue, being at his Death of the Age of 18, and having never taken upon him the Executorship of his Father; and before his Death he made his Will, and thereby devised to his Wife (the Plaintiff) all his Estate Real and Personal, and what else he could give her, and made her sole Executrix: And the Question was, whether she as Executrix to her Husband, or the Children of the Testator's Sisters, should have this Personal Estate.

to A; and makes his Son Executor, and B Executor, in Trust for his Son during the Son's Minority. The Son lives to 18, and then dies without Issue; this Personal Estate shall go to the Executor of the Son, and not to A.

For the Plaintiff it was insisted, that here was an Estate by this Devise absolutely vested in the Son, and that no Words in the Will could afterwards divest it, and that it is against the nature of a Personal Estate to be thus limited over; and the Son had by this Devise an absolute Right in the Personal Estate, and might spend it or forfeit it: And the Case of *Clent* and *Ridges* was cited, where a Man devised 6000 l. a-piece to his Sisters, but if they should happen to die before 21, he devised it over, and the Lord *Shaftesbury* in that Case decreed for the Remainder-Men, but that Decree was afterwards reversed upon an Appeal to the House of *Lords*; and it was much insisted on, that the Devise to the Lord *Craven* being during the Minority of the Son, that ought in this Case to be intended until he should attain the Age of 17 Years; and the Lord *Craven* being also made Executor during the Minority of the Son, it shews the Testator intended that the Lord *Craven's* Interest in the Personal Estate should determine when the Son attained the Age of 17 Years, and the Personal Estate being then absolutely vested in him, cannot afterwards be divested.

For the Defendants it was insisted, that the Intent of the Testator and the Letter of the Will carried this Estate to them, and that Devise did well enough consist with the Rules of Law, here being no Estate actually vested in the Son, it being a Trust in the Lord *Craven*; and that

during

during Minority was always taken in our Law to be till the Party attained the Age of 21 Years.

Lord Keeper said he was troubled to see the Intent of the Party in any case disappointed, but more especially in the case of a Will, which is many times made in haste, when there is not time for that Advice and Deliberation which may be used in other Cases; and therefore as far as the Rules of Law will permit, the Intent of the Party ought to be supported; and said, this Will might certainly have been so penned that it should have gone over to his Sister's Children: And he took the Question touching the Minority, to be a considerable Point; and observed, that tho' an Infant at 17 might Administer, yet he could not till he was of full Age commit a *Devastavit*; and said, if it be a Trust vested, the Limitation over must not be indured; but if it be not vested, it will come near the Case of *Massenburgh* and *Astr*: But said he would consider of it, and have the Opinion of the *Judges*.

Tho' an Infant at 17 may Administer, yet he can't commit a *Devastavit* until 21.

Ante Case 230. 298.

D E

Term. S. Trinitatis,

I Jacobi II. 1685.

IN CURIA CANCELLARIÆ.

Anonimus:

PER Cur'. Tho' the Court will not proceed against a Member, that has Privilege of Parliament; yet if a Parliament Man sues at Law, and a Bill is brought here to be relieved against that Action, the Court will make an Order to stay Proceedings at Law till Answer or further Order.

Case 324.

If a Member of Parliament sues at Law, and a Bill is brought to be relieved against that Action, the Court will grant an Injunction till Answer or further Order.

Hall versus Dunch.

Case 325.

1 July.

At the Rolls.
Sir John Churchill Master of the Rolls.

THE Case was, I. S. in 1663 by his Will in Writing devises the Lands in question to A. in Tail Male, Remainder to the Plaintiff in Fee; and having afterwards Occasion for Mony, mortgages these Lands in Fee, and in 1683 dies. A. being dead without Issue, the Plaintiff, who had the Remainder, brings his Bill to be let into the Benefit of this Devise. It was objected by the Council for the Defendant, who was the Heir at Law, that this Mortgage being a Mortgage in Fee, was an absolute Revocation of the Devise; if it had been but a Mortgage for Years, then they did admit, the Reversion would have

A. devises Lands, and then makes a Mortgage thereof in Fee.

This is a Revocation in Law; but otherwise in Equity.

Post Case 334.

P p p

passed

passed, and that would have carried with it the Equity of Redemption, and so the Revocation should have been *pro tanto* only. But here being an Estate in Fee Mortgaged, *That* goes to the whole, and is a full and absolute Revocation in Law; and being an absolute Revocation in Law, there was no Reason for Equity to aid the Plaintiff against the Heir at Law. *First*, Because it is a Will made above 20 Years before the Death of the Party. *Secondly*, The Testator intended not an Immediate Estate to the Plaintiff, and he was but very remotely considered in the making this Will, the Testator having put the whole Estate in the Power of *A*, who having an Estate Tail might have barr'd the Remainder which was devised to the Plaintiff.

For the Plaintiff, It was insisted that this Mortgage should be a Revocation only as to the Mortgage-Monies; and tho' in Law it was an Implicite Revocation of the whole Estate, yet Equity will consider the Intent of the Party, which was only to supply his Occasions with the Money, and not done with a Design to revoke the Devise in the Will; and the Case of *Thorne and Thorne* was insisted on as a Case express in Point, that a Mortgage, tho' in Fee, shall be a Revocation *pro tanto* only; and the Case of one *Haggott* in the time of the Lord Keeper *per Coventry* was likewise cited, as also the Case of *Mountague and Jeffereys* in *Rolls*.

Ro. 1. Abridgement 616.
Letter U. No.

21

The *Master* of the *Rolls* was of Opinion, that a Mortgage should be a Revocation *pro tanto* only: And in regard there were Four or Five Witnesses, who swore that after this Mortgage the Testator declared his former Will should stand, the *Master* of the *Rolls* thought that was a new Publication of Will, and then certainly the Equity of Redemption well passed: tho' it was objected, that such Paroll Declarations, since the Statute of *Frauds* and *Perjuries*, would not amount to a new Publication. And he said, there were four things which Equity favour'd, *viz.* *Liverie*, *Attornment*, Assent to a Legacy, and the new Publication

Four Things
favoured in E-
quity.

of

of a Will: and in either of those Cases a slender Evidence would serve Turn.

And whereas the Defendant's Council pressed for a Tryal at Law, whether there was a new Publication or not, the *Master* of the *Rolls* said, the Cause must properly end here, and where the Court has a Jurisdiction as to the End, it must have likewise as to the Means; and since he was fully satisfied in the Evidence, he said, he would not send it to a Tryal at Law; and Decreed for the Plaintiff.

Masden versus Bound.

Case 326.

2 July.

*Master of the
Rolls in Court.*

THE Plaintiff examined his Witnesses *de bene esse* in *Michaelmas* Vacation, and in *Hillary* Term following the Defendant puts in an Answer, and about five Weeks afterwards, before any Replication filed, or Examination in chief, the Witness dies: And now it was moved by Mr. *Serjeant Maynard*, that the Plaintiff might be at Liberty to read this Deposition at Law; and in as much as by the strict Rules of the Common Law, no Depositions of Witnesses taken *de bene esse*, or before Issue joyned, can be read or given in Evidence, It was also pray'd that the Defendant might be order'd not to oppose the reading of this Deposition at a Tryal at Law; which the *Lord Keeper* held reasonable, for that otherwise an Examination *de bene esse* would be to no Purpose.

Depositions of a Witness examined *de bene esse*, he dying before he was examined in Chief, ordered to be read at a Tryal at Law.

Hard. n. 332.
1 Salf. r. 278.

(3.)
Jo. Ch. J. r.
164.

Raym. 335.
336.

Mr. *Porter* this Day moved the *Master* of the *Rolls* to discharge this Order, because the Plaintiff had been negligent, or otherwise he might have examined his Witness in chief, the Answer having been put in above five Weeks before the Witness died; or he might have try'd the Matter at Law in *Hillary* Term, before the Death of the Witness. But it was answered, the Plaintiff could not go to Law before he had the Defendant's Answer, to see if he would confess the Matter of Fact; and that he stood out

two Months in Contempt before he would answer; and tho' the Plaintiff might have replied within the five Weeks, yet he could not well have examined in chief, the Witness and the Plaintiff both living in *Cheshire*; and this was not such a Lapse of Time as ought to deprive him of the Benefit of the Evidence; and the rather, for that (tho' it is not regular by the Course of the Court) the Defendant's Commissioners join'd in the Execution of this Commission, so that here could be no foul Practice; and therefore the last Order was confirm'd.

Case 327.

Umlin versus

Not necessary, in a Plea of a former Suit brought for the same Matter, to aver, that such Suit is depending.

THE Defendant pleads that the Plaintiff brought a former Suit for the same Matters, which Suit is still depending for ought he knows to the contrary.

For the Plaintiff it was insisted, that this Plea was not good, because he does not positively aver that the former Suit is still depending, and no Issue can be taken upon his Knowledge to the contrary.

Plea of a former Suit depending for the same Matter is put in without Oath.

But the *Master* of the *Rolls* allow'd the Plea, because the Defendant ought not to have set it down to be argued, for by that he admits that the former Suit for the same Matter is depending, but the Plea ought to have been referr'd to a Master to examine whether there was a former Suit depending, for the same Matter, or not; and said, there needs no positive Averment that the former Suit is still depending, for that is examinable by the Master; and the Defendant never swears a Plea of a former Suit depending, but it is always put in without Oath.

THIS Vacation died Francis Lord Guilford, Lord Keeper of the Great Seal of England, at his House at Roxden in Comitatus Oxon. And the Right Honourable George Lord Jefferies, Baron of Wem, Lord Chief Justice of England, had

had the Custody of the Seal deliver'd to him at Windsor, by the Style and Title of Lord Chancellor of England. And Sir Edward Herbert, Chief Justice of Chester, was made Lord Chief Justice of England, and sworn of his Majesty's Privy Council; and Serjeant Lutwich was made Chief Justice of Chester.

This Vacation also died Sir John Churchill, the Master of the Rolls, at his House in Somersetshire; and Sir John Trevor, the Speaker of the House of Commons, was made Master of the Rolls.

This Vacation also died Sir Thomas Walcott, one of the Justices of the King's-bench; and Mr. Baron Wright, one of the Barons of the Exchequer, was removed into the King's-bench; and Sir Edward Nevill was made a Baron of the Exchequer.

D E

Term. S. Michaelis,

I Jacobi II. 1685.

IN CURIA CANCELLARIÆ.

Case 328.

Bill not to be
dismissed on
20 s. Costs, but
Defendant to
be paid the
Costs which
he swears he
is out of Purse.

THE Lord Chancellor declared, that he would not allow of the Rule of dismissing a Bill with 20 s. Costs; but that for the future the Defendant should have the Costs he should swear he was out of Purse; but in such Affidavit he must specify the Particulars, that the Court may judge of the Reasonableness of them, if there should be occasion.

General Affi-
davit of having
a material Wit-
ness not suffi-
cient for a new
Commission,
but the Wit-
ness must be
named in the
Affidavit, as al-
so the Point
to which he is
to be examined.

He also declared, that the general Affidavit of having material Witnesses beyond Sea, should not be sufficient for a new Commission, but the Witnesses must be named in the Affidavit, and the Point mentioned to which they can materially depose.

Brathwaite versus Brathwaite.

Case 329.

24 Octobris.

In Court
Lord Chancellor.
A. B. a Wi-
dower settles
Lands to raise
100 l. a Year
for his eldest
Son and 100 l.

Tenant in Tail with the Remainder in Fee to himself levies a Fine, and settles his Estate on Trustees, in the first place to pay his Son and Heir 100 l. per Ann. and then to make a Provision of 100 l. a-piece for his younger Children, Sons and Daughters, to be raised and paid

paid according to their Seniority, and a Maintenance in the mean time.

In this Case the Lord Chancellor decreed, *first*, that whereas at the time of the Settlement, the Party that made it was a Widower and had eight Children by his first Wife, and declared he intended not to marry again, yet in regard he afterwards married a second Wife, and had many Children by her, that the Children by this second Wife were equally entitled with the Children of the first to have the Benefit of this Provision for younger Children.

a-piece for his younger Children, and afterwards he marries again, and has Children by his second Wife.

Decreed the Children by the second Wife were equally entitled with the other younger Children.

Secondly, That whereas the Deed directs the Provision for his younger Children should be raised and paid according to their Seniority, that yet in case there should happen a Deficiency, the Eldest should not have more, and the younger less, but they should be all paid in Average.

Tho' the Portions of the younger Children were by the Settlement to be paid according to their Seniority, yet in case of a Deficiency they shall be paid in Average.

Thirdly, That whereas many of the younger Children by the first Wife died in the Life-time of their Father, that the Administrators of the Children so dead should have no Benefit of this Provision, but the same should cease; but in case any of the Daughters had been married in the Life-time of the Father, and died, the Husbands as their Administrators should have had their Portions; and no certain time being appointed for Payment, but the same being left indefinitely, it does not naturally attach till the Death of the Father; and his Lordship took a difference betwixt a Portion or Provision, and a Legacy payable at the Age of 21 Years, &c.

The Portions of the younger Children who died in the Life of their Father, nor to be raised in favour of the Administrators.

Otherwise if any of the Daughters had married in the Life of their Father, and afterwards died,

Fourthly, That whereas Thomas the Son and Heir, who was to have 100*l.* per Ann. in the first place, had purchased in a Statute which was an Incumbrance on the Estate, that he should be allowed no more than what he really paid for it; and that the whole Estate must in the first place be looked on as liable to satisfy this Incumbrance, and then to raise the 100*l.* per Ann. and Arrears,

The Heir buying in an Incumbrance on the Estate charged with the Portions, allowed no more than what he really paid.

Vide the next Case.

and the Surplus for raising the Provisions for younger Children, but that their Maintenance should go on in the mean time.

Cafe 330.

27 Octobris.

In Court,
Lord Chancellor.

A Stranger gets an Assignment of a Mortgage for less than is due.

The Mortgagor or his Heir shall not redeem without paying the whole that is due.

Phillips versus Vaughan.

A. Mortgages his Land to B. C. a Stranger buys the Interest of B. for less than was really due on the Mortgage, and the Heir of the Mortgagor brings his Bill to redeem, and the Question was, whether C. shall be allowed more than he really paid.

For the Plaintiff it was insisted, that a Stranger purchasing an Incumbrance, that had no Interest before in the Estate, so that it was not to protect his Purchase or any thing of that nature, ought to be allowed no more than he really paid.

Lord Chancellor. This Cafe has neither Point nor Edge; for there is no Colour why, when the Heir of the Mortgagor comes to redeem the Mortgage, he should not pay the whole that is due on the Mortgage. If another Man has met with a good Bargain, there is no Equity for the Heir of the Mortgagor to deprive him of the Benefit of it, and make an Advantage thereof unto himself: But if a Man had purchased without Notice of this Incumbrance, he might possibly have had an Equity to have redeemed the Incumbrance for what was really paid for it.

Oldfield versus Oldfield.

Cafe 331.

27 Octobris.

In Court
Lord Chancellor.

One by his Will gives 3000 l. to his younger Children, which was secured by Mortgage from

SIR John Oldfield by his Will amongst other things devises as follows, viz. Item, I give 3000 l. to be equally divided amongst A. B. and C. my three younger Children, which said Sum is in the Hands of Sir John Tufton; and in his said Will he adds this Clause, viz. And for

for the more sure Payment of the said Sum, in case his Son and Heir, whom he thereby appointed his Executor, should not pay the same according to his Will, then he devised his Lands to his younger Children for the raising and Payment thereof, and appoints the same to be paid unto them at 21 or Marriage, which should first happen, and a Maintenance out of his Lands in the mean time.

4. and declares that if his eldest Son does not pay this 3000 l. then his Lands shall go to the younger Children. A brings a Bill to redeem his Mortgage, and to pay in his Mortgage-Mony, and pays it pursuant to the Decree, and the Master puts it out upon a Security that proves ill. The eldest Son shall not be compelled to pay it over again to his younger Brothers.

Sir *John Tufton* being minded to pay in this 3000 l. exhibits his Bill against the Executor and the Infants, who appeared by their Mother as their Guardian, and obtains a Decree for Redemption of his Mortgage, and a *Master* is appointed to see the Monies put out on Security for the Benefit of the Infants. The *Master* makes his Report, and thereby approves of Securities for placing out the Mony, viz. Sir *Robert Viner's* Bond for 1000 l. Alderman *Backwell's* Bond for another 1000 l. and *Meynell's* Bond for the third 1000 l. and the Mony is put out accordingly.

These Persons proving insolvent, the Infants by their now Bill would resort to the Lands, and charge the Estate of the Heir with this 3000 l.

The Council for the Plaintiffs urged, that where there were two Funds for securing the Payment of Infants Portions, if one failed they might resort to the other; and put this Case, that if a Man by his Will had charged the Lands of his Heir for Payment of Portions to his younger Children at 21 or Marriage, and the Heir in the Minority of the younger Children should exhibit his Bill to pay in the Monies and have his Lands discharged, the Court of Chancery in such Case would not discharge his Lands; nor in any Case, where Infants were concerned, change a real into a personal Security.

But the *Lord Chancellor*, upon the first opening of the Cause, took the Case to be clear against the Plaintiffs; for that the Intention of the Testator appeared to be that

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there should be an effectual Payment of the 3000*l.* For Sir *John Tufston's* Security might have failed, or his Heir and Executor might have received it of him, and have refused or neglected to have paid it over to the Infants; and in either of those Cases the Lands should have been charged; but they were only supplementally chargeable, in case of such a Defect or Deficiency: But here, when there has been a real and effectual Payment, and the Monies put out upon Securities, which could not then be objected against, but were approved of by the Mother of the Infants, who by Will was made their Guardian, and allowed of by the Court, there could be no Reason after all this, that the Heir should be charged with these Monies; nor can it be an Objection that the Monies were paid in before the time appointed by the Will, *viz.* before the Infants were either married or had attained 21 Years of Age, for it was not in the Power of the Heir and Executor to compell Sir *John Tufston* to keep the Monies in his Hands, when he was minded to pay it in; and said, the Case put by the Plaintiff's Council was not like this, but admitted that the Lands of the Heir, when charged for Payment of Portions to Infants at 21 or Marriage, shall not be discharged before that time, nor that a real Security for Infants Portions shall be changed into a Personal one, where the Lands are originally charged; but here the Lands were only supplementally charged, in case the 3000*l.* had not been effectually paid; and the Payment made in this Case he adjudged to be effectual, and according to the Intent of the Testator, and therefore dismissed the Bill.

Lands of an Heir are charged with Portions to Infants at 21 or Marriage: the Portions shall not be admitted to be paid in before they grow due, in case of the Land.

Duke of Southampton, as Administrator of his late Wife, Plaintiff.

Case 332.

Eodem die.

In Court,

Lord Chancellor.

Cranmer & al. Executors of Sir Henry Wood, Defendants.

THE Bill was brought by the Duke of *Southampton*, who married the Daughter and Heir of Sir *Henry Wood*,

Wood, as Administrator to his late Wife, for an Account of the Personal Estate of his said Wife, *viz.* the Profits of her real Estate received by Trustees in her Life-time. The Case arose upon the Construction of a Deed of Settlement and Will made by Sir *Henry Wood*, wherein, amongst other Things, it was recited, that a Marriage was intended between the Duke of *Southampton* and the Daughter of Sir *Henry Wood*; and then comes a Clause, that in case the Daughter should live to attain the Age of *Sixteen Years*, and should refuse to marry the said Duke of *Southampton*, then the said Duke should have 20000*l.* out of his Personal Estate; and afterwards there is another Clause to this Effect, *viz.* And if it shall happen, that the said intended Marriage shall not be had till after his Daughter attained her Age of *Sixteen Years*, then he upon such Marriage had, settles his Real and Personal Estate upon the Duke and his intended Wife for their Lives, &c.

The Marriage takes Effect, the Lady being under the Age of *Sixteen Years*; she lives to attain *Sixteen Years*, and before *Seventeen* dies without Issue.

The Defendant's Council would have it, that by this Settlement, to which the Will refers, the Personal Estate was not vested, so as to intitle the Administrator of the Wife, by reason the Marriage was had before she attained the Age of *Sixteen*; and that it was Sir *Henry Wood's* Intent to restrain his Daughter from marrying before she attained that Age.

Lord Chancellor. I take the Intent to be quite otherwise. The Thing chiefly aimed at was that there might be a Marriage had betwixt the Duke and Sir *Henry Wood's* Daughter, and for that Intent is the Clause of 20000*l.* Penalty, in case at *Sixteen Years* of Age she should refuse to marry him; and this latter Clause is only to bring in that 20000*l.* again into the Personal Estate, and to be set-

settled to the same Uses with the rest, in case the Marriage should be had after her Age of *Sixteen* Years; and to me it does in no sort imply, that they might not marry before that time; and therefore decreed an Account, &c.

Cafe 333.
4 Novembris.

Thruختen versus Attorney Gen.

In Court
Lord Chancellor.

One seized in Fee of Lands limits a Term to Trustees for a *Hundred* Years, upon such Trust as he by Deed or Will should appoint, and for want of such Appointment to attend the Inheritance; and afterwards by a *nuncupative* Will gives *All, All* to *I. S.* and being a Bastard dies without Issue: this will not pass the Trust of the Term.

A Man seized of Lands in Fee, by Settlement limits a Term for a *Hundred* Years to Trustees in Trust for such Uses; Intents and Purposes, as he by Deed or Will in writing should declare, direct, limit, or appoint, and for want of such Will or Deed to attend the Inheritance. This Man being a Bastard dies without Heir, having first made a *nuncupative* Will, and thereby devised as follows, *viz. I Give All, All to I. S.* who had now Administration with the Will annexed; and the Question was whether this Term should escheate with the Inheritance.

It was insisted by the Council for the Plaintiff, *First*, That this was not a Prerogative Case, and there was no Difference in the Case of an Escheate, whether the Lands were to come to the King or to the Mesne Lord.

Secondly, A Term limited to attend the Inheritance does not at Common Law attend the Inheritance, for there in the Eye of the Law it is a Term for Years, and must go in a Course of Administration, if Equity did not interpose; and where the Case does not carry an Equity along with it, the Chancery ought not to interpose, but let the Law take Place: and an Escheate (which is properly only where there is no other Person to take) is not to be favoured in Equity, especially where it turns to the Wrong of a third Person; and even in Equity a Term limited to attend the Inheritance shall in many Cases be severed from it, as if a Man dies indebted, a Term limited to attend the Inheritance shall be Assets, and made liable to his Debts.

Thirdly,

Thindly, Where a Man comes in Paramount him who limited a Term to attend the Inheritance, as the Lord by Escheate does, he comes in *le post*, and shall have no Benefit of the Term; and for that Reason it was ruled in the Case of *Pheasant* and *Pheasant*, that a Widow, who claimed Dower, coming in Paramount, should have no Benefit of the Term, that was limited to attend the Inheritance.

Fourthly, That this nuncupative Will was long before the Statute of *Frauds* and *Perjuries*, and then a Man might dispose of a Trust by Parol; and that the Word *All* in this nuncupative Will would certainly carry the Term; and therefore it was insisted, that it was well appointed to the Administrator with the Will annex.

Lord Chancellor. I do not take it, that what Mr. *Serjeant Pemberton* laid down as an established Rule, is so; for if a Man seized in Fee raises a Term and lodges it in Trustees to attend the Inheritance, and afterwards dies indebted, I never heard, that that Term should be made Assets, but have heard it often denied: But indeed where the Inheritance is in Trustees, and a Man has a Term in his own Name, which is limited to attend the Inheritance, and dies indebted, the Term in that Case shall be liable to his Debts; for it is Assets at Law. But as to the Principal Case I take the Question to be no more than, whether a Term attendant on the Inheritance may escheate or not, for if it will in any Case, it must escheate here. I agree that generally speaking a Man before the Statute of *Frauds* and *Perjuries* might dispose of a Trust by Parol; and I also agree, that the Words, *All, All*, would be sufficient to pass a Lease for Years; but in this Case the Term being settled by Deed expressly upon these Trusts, *viz.* for such Uses, Intents and Purposes as he by Deed or his last Will in writing should appoint, and in Default of such Appointment then to attend the Inheritance, this restrains and ties up his Hands from making any Parol Disposition: and I

A Term vested in Trustees is not Assets to pay Debts; otherwise if the Term be in the Party himself, and the Inheritance in Trustees.

take his Intent by the Words *All, All*, to be all that he could dispose of by Parol; and so the King in this Case is not in barely in the *Post*, but in the *Per* also; for the Term for Years goes with the Inheritance by the Express Limitation of the Party.

Hall versus Dunch.

Case 334.
27 Novembris.

Lord Chancellor.
Ante Case 325.

THIS Cause coming this Day to be heard before the Lord Chancellor, upon an Appeal from the Decree of the Master of the Rolls, he confirmed the Decree, and declared, tho' the Mortgage in Fee was a Revocation at Law, yet in Equity it should not be taken for a total Revocation; but the Devisee should be admitted to the Redemption; for the Intent of the Mortgagor making the Mortgage could be no other than only to serve his special Purpose of borrowing Mony to supply his present Occasions.

Case 335.

Jevon versus Bush.

Eodem die.

In Court.

A Trustee in a Recognizance releases it without any Consideration, Decreed to pay the Principal and Interest not exceeding the Penalty.

HENRY Beard Lord Bellamount in 1647 being about to leave England, and having been in Arms for King Charles the First, and under great Oppressions from the then usurped Powers, lent 600*l.* to one Gardiner of Croydon on a Recognizance of 1000*l.* which he took in the Name of the Defendant *Bush*, and intended it as a Provision for the Plaintiff his Infant Daughter, then but two Years old; and *Bush* at the same time executed a Declaration of the Trust, and covenants that the Plaintiff might receive and enjoy the full Fruit and Benefit of this Security, without any Hindrance or Disturbance from him or any claiming under him. Soon afterwards the Lord Bellamount goes beyond Sea, and dies in Persia in 1654. Gardiner being about to sell his Estate, and the Purchaser having Notice of the Recognizance, *Bush* is prevailed upon to acknowledge

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Satisfaction; and in 1657, and not before, the Plaintiff had Notice of this Declaration of Trust, and understanding that *Bush* had acknowledged Satisfaction on this Recognizance, brings her Bill to be relieved against this Breach of Trust.

The Defendant by Answer insisted, and it was so proved in the Cause, that he was but 18 Years old when he made this Declaration of Trust; and insisted likewise, that tho' the Trust was declared to be for the Benefit of the Infant, yet it was only to protect the Father's Estate; who was obnoxious to those Times, and that he never had one Penny, directly or indirectly, for his acknowledging Satisfaction on that Recognizance, nor ever had the Recognizance in his Custody; but the Lord *Bellamont's* Widow delivered up the same, and, as he believes, received the Monies due thereon; and that he, at her Request, or by her Order, or by the Order of the Lord *Bellamont*, acknowledged Satisfaction on the Recognizance, and believes he had some Warrant or Order in Writing from them or one of them for acknowledging Satisfaction thereon, but that the same was burnt or lost in the Fire of *London*; and insisted that after all this length of time, Satisfaction being acknowledged in 1654, above 30 Years since, he ought not now to be charged with a pretended Breach of Trust.

The Council for the Defendant insisted, that the Plaintiff ought to prove some Fraud in the Trustee, or that he received to his own Use part of the Mony.

Lord Chancellor. The Proof lies on the Defendant's Side; he ought to discharge himself, and it is not sufficient for him to say he never received any of this Mony for his own Use: There is no doubt but an Infant may be a Trustee; and the Breach of Trust was committed in 1654, after he was of full Age; and therefore decreed him to pay the Principal Mony with Damages not exceeding 1000 *l.* being the Penalty of the Recognizance; and cited my Lord *Hobart*,

An Infant may
be a Trustee.

Hobart, who says that *cestuy que trust* in an Action of the Case against his Trustee shall recover for a Breach of Trust in Damages.

Case 336.

Darnell versus Reyny.

Where there is an Answer to part, and a Plea to the residue, the Plaintiff can't except to the Answer till the Plea is argued, or an Order obtained that it shall stand for an Answer with liberty to except.

WHERE the Defendant answers to part, and pleads to all other Matters not answered unto, the Plaintiff can't put in Exceptions to the Answer till he has first argued the Plea, or obtained an Order that the Plea shall stand for an Answer with liberty to except to the Matters not pleaded unto.

Case 337.

Popham versus Bampffield.

THE Parliament being Prorogued, you may proceed in the Account in this Court, notwithstanding the Appeal.

Case 338.

Frederick versus David.

Process.

UPON an Affidavit that the Defendant *David* was gone into *Holland* to avoid the Plaintiff's Demand against him, and he having been arrested on an Attachment, and a *Cepi Corpus* returned by the Sheriff, the Court upon a Motion granted a *Serjeant at Arms* against him, and upon the Return thereof granted a Sequestration.

Note, When a *Cepi Corpus* is once returned, there is an end of all manner of Process, (for no *Proclamation* or *Commission* of *Rebellion* goes after that) and tho' a Messenger of late Years has been usually granted in such Cases, yet he is but a new Officer, and subordinate to the *Serjeant at Arms*; but regularly in such a Case you ought to move, that

that the Defendant may enter his Appearance, and be examined within four Days, or stand committed.

Beckford versus Beckford.

Cafe 339.

THE only Point was upon the Custom of the City of London, where a Child that had a Portion, but was not fully advanced, and was to bring her Portion into *Hotchpott*, whether the Portion should be brought into the Personal Estate in general, that so the Widow might come in for part of it, or whether it should be brought into the Orphanage part only.

7 Decembris.
In Court,
Lord Chancellor.

Mony to be brought into *Hotchpott* by an Orphan shall be brought into the Orphanage part only.

2 Ch. Rep.
119.

Lord Chancellor. It is beyond all doubt that it must be brought into the Orphanage part only.

Annand versus Honeywood.

Cafe 340.

THE Point here also arising on the Custom of the City of London, the Question was, whether Mony given by the Father to be laid out in Land to be settled on his eldest Son for Life, Remainder to his first, second, third, &c. Sons in tail, should be reckoned to be an Advancement by part of the Personal Estate of the Father, so as that the Son ought to bring the same into *Hotchpott*, to entitle him to a share of the Personal Estate.

Eodem die.
In Court,
Lord Chancellor.

Mony given by a Freeman of London to be laid out in Land, and settled on his eldest Son for Life, Remainder to his first and other Sons in tail, shall not be reckoned any part of his Advancement, and be brought into *Hotchpott*.

2 Ch. Rep.
117, 129.

Lord Chancellor. There is no Colour to reckon this any part of the Personal Estate.

Tunbridge versus Teather.

Cafe 341.

A Man upon his Marriage, in Consideration of 500 *l.* Portion, by Articles precedent to the Marriage, Covenants with Trustees to add 500 *l.* more to his Wife's Portion,

8 Decembris.
In Court,
Lord Chancellor
Marriage Articles to lay out 1000 *l.* in a Purchase of

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Land to be settled on Husband and Wife for their Lives, Remainder to the Issue of the Marriage, Remainder to the Husband in Fee. Husband lays out the 1000 *l.* in the Purchase of a great House and Gardens, and Farm, which would let but at 25 *l.* *per Ann.* It is a good Performance of the Articles.

tion, and that it should be laid out in Land, and settled to the use of the Husband for Life, Remainder to the Wife and the Issue of her Body by him, Remainder to the right Heirs of the Husband. The Husband without the Consent of the Trustees purchases a Farm, on which there was a great House and Gardens, and pays 1000 *l.* for it, tho' in Truth it was worth no more than 25 *l.* *per Ann.* and takes the Conveyance to him and his Heirs, and afterwards settles it to the Uses in the Articles.

The Bill was to have the defective Value supplied: And for the Plaintiff it was insisted, *first*, that this was not a Settlement according to the Articles, because the Purchase was made to the Husband and his Heirs, and he afterwards settles it to the Uses in the Articles; whereas if it had been bought with the Wife's Mony, and the Conveyance had been made to the Uses in the Articles, then the Estate had not moved from the Husband, and consequently it would not have been a Jointure within the Statute of the 11 H. 7. and then the Wife being Tenant in tail might have aliened it. *Secondly*, One thousand Pounds being to be laid out as a Provision for the Wife, it must be intended a reasonable Provision, and it could not be expected that 1000 *l.* should produce less than 50 *l.* *per Ann.* and it was not intended to be in the Power of the Husband to defeat such Provision by laying out the 1000 *l.* in a fine House and Garden, which would not serve to buy Bread for the Widow; and this appears more plainly from another Clause in the Articles, by which in case a Purchase was not made according to the Articles, the Wife was to have 700 *l.* in Mony, or 50 *l.* *per Ann.* at her Election.

But the Lord Chancellor was of Opinion, that the Husband having really laid out 1000 *l.* in the Purchase, and the Father of the Plaintiff having viewed the Estate before the Purchase was made, tho' it was not of so good a Value as might have been purchased with 1000 *l.* it must be taken as a Performance of the Articles; and therefore dismissed the Bill.

Knight

Knight versus Calthrope.

Case 342.

Eodem die.

In Court.

A Man upon his Marriage charges his Lands with a Rent-charge for the Jointure of his Wife, and afterwards by his Will devises Part of these Lands to his Wife. The Plaintiff's Bill was that the Lands devised to the Wife might bear their Proportion of the Rent-charge; otherwise the rest of the Lands, that were not sufficient to pay the Rent, would be clogg'd with the Arrears, which in time would swallow up the Inheritance.

And on his Marriage settled a Rent-charge on his Wife for her Jointure, and afterwards devises to the Wife part of the Land charged with the Rent-charge. 'Bill' is that the Rent-charge might be appportion'd. Bill dismissed.

Lord Chancellor. The Grantee of the Rent-charge may distrain in all or any Part of the Lands for her Rent, and there is no Reason to abridge her Remedy in Equity; and the Husband certainly intended her some Benefit by this Devise, and he has not declared it should be accepted in part of the Rent-charge; and therefore dismissed the Bill.

Witmore versus Weld & al'.

Case 343.

Eodem die.

*In Court.**Ante Case 323.*

UPON the *Lord Chancellor's* coming to the Seal the Plaintiff obtained an Order to have this Cause heard before his Lordship, and not to stay for the Judges Certificate; and this Day coming on to be heard accordingly, the *Lord Chancellor* was of Opinion, that the Devise to the *Lord Craven* during the Minority of the Testator's Son upon the whole complexion of the Will should determine, when the Son attained *Seventeen* Years of Age; and *Secondly*, had that been otherwise, yet it was a Trust vested in the Son, and the Remainder over was void; and therefore decreed for the Plaintiff, and said, if the Matter in Question had been but for 100 l. it would not have held an Hour's Debate.

Red-

Redman versus Redman.

Case 344.

9 Decembris.

In Court,
Lord Chancellor.

Upon a Treaty of Marriage between *A* and the Daughter of *B*. *B* would not consent to the Marriage, for that *A* owed 200*l.* to *F. S.* to remove which Objection, the Brother of *A* proposes to get up *A*'s Bond and to give his own in the room of it.

But privately *A* gives a Counter Bond to his Brother, and the Daughter of *B* is privy to this and encouraged it. *A* dies, his Wife takes Administration. The Wife shall avoid this Counter Bond tho' Party to the Fraud. Also *A* himself might have been relieved against this Counter Bond,

THE Case was, that upon a Treaty for a Marriage between *Charles Redman* and the now Plaintiff, the Plaintiff's Father would not consent to the Match, by reason that *Charles Redman* was indebted in the Sum of 200*l.* to one *Bryan*, for which he and *Joice* his Mother stood bound in a Bond: to remove this Obstruction, *Henry Redman* (younger Brother of *Charles*) and *Joice* the Mother give a new Bond to *Bryan* for the Payment of this Debt; and thereupon the Bond wherein *Charles* was bound was delivered up to be cancelled: but *Charles* gives his Brother *Henry* a Counter Bond to indemnifie him against this Debt; and paid the Interest of the 200*l.* to *Bryan* during his Life; and it was in Proof in this Cause, that the now Plaintiff, the Widow of *Charles*, was privy to all this Matter, and that she being in love with *Charles* contrived this way to satisfy her Father, that the Marriage might take Effect; But now being sued by *Henry* on the Counter Bond, as Administratrix to her Husband, she brought her Bill to be relieved.

The Defendant's Council insisted, that *Henry* became bound in this Bond voluntarily, having no manner of Obligation on him to pay this Debt for his elder Brother, but it was done at the Instance and Request of his Brother and the now Plaintiff, who contrived this means to bring the Match about; and insisted that if *Charles* himself had been Plaintiff, he should not have been relieved against this Counter Bond: And his Administratrix, who was privy to this Transaction, could have no better Right than *Charles* had.

Lord Chancellor. This is a plain Fraud, and by this Contrivance the Father of the Plaintiff was drawn in to give the greater Portion; and he absolutely refused to marry his Daughter,

Daughter, 'till *Charles* was made a clear Man, and particularly discharged of this very Debt; and tho' *Henry* had no obligation on him to become bound for his elder Brother's Debt, yet it was all one to the Plaintiff's Father which Way that Debt became discharged; but that was to be first done, let it be one Way or other: And declared, that in Case *Charles* himself had been the Plaintiff he should have been relieved; but the Case was stronger, because if this Bond should be suffered to lye on *Charles's* Estate, it might swallow the Assetts, and defraud his Creditors; as it also injured the Plaintiff in the Right she had by the Custom of *London* to the Personal Estate of her Husband; and therefore decreed the Bond to be delivered up.

Hale versus Thomas.

Case 345:

18 Decembris

In Court.

2 Ch. 182;
186.

IN 1638, those, under whom the Defendant now claims a Debt of 1300*l.* Principal Mony then lent, acknowledged a Judgment for 2000*l.* Penalty, defeazanced for the Payment of the Principal Monies with Interest. The Defendant for *ten* or *twelve* Years together had kept the Plaintiff out of his Debt, by fencing with prior Incumbrances, which were in truth satisfied, and by setting up a pretended Entail, which on a Tryal at Law was found against him. The Plaintiff had exhibited a former Bill, and thereby only pray'd, that the Defendant might come to an Account and accept what, if any Thing, should be found to be due to him on those prior Incumbrances, and that the Plaintiff might be let into a Satisfaction of his Debt; but did not pray further, as he might have done, that if the Defendant should be found to have raised or received more than was due to him, that he might pay over the Surplus to the Plaintiff; and upon the Account taken in the said Cause it was found, that the Defendant was over paid with a Surplus of 4000*l.*

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Equity in some Cases carries the Debt beyond the Penalty; as when a Debt is due to a Person, and he is kept out of it by an Injunction. But a Plaintiff in Equity can't charge the Defendant beyond the Penalty any more than he can at Law.

The Plaintiff's now Bill was, that he might have those Monies towards his Debt, and be satisfied his Principal Monies with Interest and Costs; and the Matter came on now to be argued on the Defendant's Plea, who had pleaded the former Bill brought by the Plaintiff, and the Proceedings thereon, and that after the Account taken in the former Cause, the Plaintiff had proceeded at Law, and revived his Judgment by *Scire fac.* and taken Execution by *Elegit*, and that thereupon the Defendant had brought the whole Penalty of the Bond into the Court of *Common-Pleas*, and insisted that a Court of Equity ought not to charge him beyond the Penalty of the Judgment; and this Plea was allowed by the Court. Not but that Equity may, and in many Cases doth, carry on the Debt beyond the Penalty of the Security, as where the Party hath been delayed by Injunction of this Court, and the like; but it was observed, that where it has been so done, it has been always against a Plaintiff, when he hath come for Relief: But there is no Precedent where a Plaintiff in this Court shall charge a Defendant beyond the Penalty, and further than he could charge him at Law: But in this Case the Court allowed the Plea, principally because the Plaintiff after the Account taken in the former Cause had surceased his Prosecution in this Court, and proceeded at Law, having sued forth a *Scire fac.* on his Judgment, and taken forth Execution, and therefore having elected to proceed at Law, he should not now resort back to Equity; especially as this Case is, where he hath taken Execution by *Elegit*, which charged a Moiety of the Lands only, and now would come for a Decree in Equity for the same Debt, which would charge the Person and the whole Estate, and therefore the Court allowed the Plea.

Note, In this Case the Plaintiff thought it most for his Advantage to prosecute at Law, expecting to have held the Lands at the extended Value, and if the Defendant had come for Relief in Equity he should not have redeemed or charged the Plaintiff with the real Value, unless

less the Defendant would have offered to pay the whole Principal Monies with Interest and Costs. But as soon as the Plaintiff had extended at Law, Mr. *Serjeant Maynard*, the Defendant's Council, advised him to bring a *Scire fac.* against the Plaintiff to shew cause why the Extent should not be taken off on Payment of the Penalty of the Judgment, which he at the same time offered to pay, and brought it into the Court of *Common-Pleas*.

Nosworthy versus Basset.

Case 346.

THE Plaintiff having filed a special Replication, the Defendant put in a Plea and Demurrer to the Replication; his Plea was, that since his Answer put in, he had recovered the Estate in question in an Ejectment upon full Evidence at a Tryal at the Bar; and Demurred to other special parts of the Replication.

Eodem die.
In Court,
Lord Chancellor.
Whether after a Plea or Demurrer to a special Replication allowed, the Plaintiff may be admitted to put in a general Replication.

The Plaintiff's Council admitted the Plea and Demurrer to be good, which were therefore allowed by the Court; but the Court refused to declare any Opinion, whether the Plaintiff might not, notwithstanding the Plea and Demurrer were allowed, afterwards put in a general Replication: And the Plaintiff's Council conceived they might, because the Plea and Demurrer were tied up to that Replication only; but seemed to admit, that it might have been so pleaded, as that the Matter settled by the Tryal at Law should not have been drawn into Issue or examined unto.

Anonimus.

Case 347.

UPON a Motion it was declared by the Court that a Cause having been heard upon a Bill of Interpleader, and a Tryal at Law directed to settle the Right between the Defendants, there is an end of the Suit as to

a Bill of Interpleader, a Tryal at Law is directed between the Defendants. The Suit is thereby ended as to the Plaintiff, so that if the

Plaintiff dies,
Defendants may
proceed with-
out reviving
the Cause.

the Plaintiff; so that if he afterwards dies, the Cause shall still proceed, and there needs no Revivor, each Defendant being in the nature of a Plaintiff.

Cafe 348.

Lord Chancellor.

Oddy versus Torlas.

THE Plaintiff having agreed with the Defendant for the Office of Clerk of the *Bridge-house* for 950 *l.* deposited 500 *l.* in Mony; and a Bond of 900 *l.* Penalty was entered into by himself, with a sufficient Surety for 450 *l.* more, which was to be delivered to the Defendant upon his Surrender of his Office to the Plaintiff; the Plaintiff was admitted, and the Defendant received the 500 *l.* and the Bond, and afterwards came to an Agreement with the Plaintiff, that the Plaintiff should pay him 80 *l.* yearly until the 450 *l.* was paid off. The Plaintiff had paid him on that Account so much as exceeded the 450 *l.* and Interest by 300 *l.*

The Plaintiff's Bill was therefore to have the Articles for Payment of the 450 *l.* and 80 *l.* *per Ann.* in the mean time, and a Judgment on a Bond for Performance of Covenants, delivered up, and the Surplus of the Mony repaid with Interest.

The Defendant insisted, that it having been tried in the *Common-Pleas*, whether the Contract was usurious, by Rule of that Court, and there found not to be usurious, and there being still a great deal of Mony due to him on that Account, the Plaintiff ought not to be relieved without Payment of it: But it appearing to the Court that the first Agreement which was made with the Plaintiff's Friends Privy was for 950 *l.* and that they were not privy to the second Agreement; but the Plaintiff's Necessity was worked upon therein; for that, as it was penned, the Plaintiff was to pay 80 *l.* *per Ann.* till the 450 *l.* and every part of it was paid, so that if there were but 5 *l.* of it unpaid, yet the

the Plaintiff must pay 80 *l. per Ann.* till it was paid; the Lord Chancellor declared, that if the Plaintiff had paid beyond 950 *l.* and Interest, he should pay no more; but for what was actually over-paid he would not relieve him: But decreed, that what Money had been brought into Court by the Plaintiff to continue the Injunction should be delivered out of Court to him, and that the Defendant should acknowledge Satisfaction on the Judgment, and deliver up the Articles and Bonds.

John Kew versus Rouse and his Wife.

Cafe 349.

Jan. 1685.

Lord Chancellor.

THE Plaintiff's Wife, whose Administrator he is, and the Defendant's Wife were the two Daughters of Elizabeth Wife, who being possessed of a Term for Years, in April 1679 devised that Term and all her Interest therein unto her two Daughters, they paying yearly to her Son 25 *l.* by quarterly Payments, viz. each of them 12 *l.* 10 *s.* yearly out of the Rents of the Premises during his Life, if the Term so long continued. The Plaintiff's Wife being dead, the Defendant claims the whole by Survivorship; and whether it was a Joint Tenancy or a Tenancy in Common was the Question.

A Devise of a Term to A and B, paying 25 *l.* a Year out of the Rents to one during his Life; viz. 12 *l.* 10 *s.* by each of them, is a Tenancy in Common.

The Lord Chancellor conceived it clearly to be a Tenancy in Common; for that 25 *l. per Ann.* was to be paid by the two Daughters equally in Moieties; and decreed an Account of the Moiety of the Profits to the Plaintiff, as Administrator to his Wife.

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Termino S. Hillarii,

1 & 2 Jacobi II. 1685.

IN CURIA CANCELLARIÆ.

Bechinall versus Arnold.

Case 350.

16 Januarij.

In Court
Lord Chancellor.

Devisee shall
not examine
Witnesses in
perpetuum rei
memoriam to
prove a Will a-
gainst a Purcha-
sor without
Notice, till the
Will has been
established by
a Verdict at
Law.

BILL to prove a Will and perpetuate the Testimony of the Witnesses. The Defendant pleaded himself a Purchasor without Notice of any such Will, and insisted, that unless there had been a Verdict in Affirmance of such Will, (nothing hindring the Plaintiff, but that if he had a Title he might recover at Law) the Plaintiff ought not to be admitted to examine his Witnesses, thereby to hang a Cloud over a Purchasor's Estate; and upon Debate the Court allow'd the Plea.

Case 351.

Eodem die.

In Court
Lord Chancellor.

A Daughter
of a Freeman
marrying with-
out her Father's
Consent loses
her Orphanage
part, unless he
is reconciled to
her before his
Death.

Foden versus Howlett.

LORD Chancellor. If the Daughter of a Citizen of *Lon-*
don marries in his Life-time against his Consent, un-
less the Father be reconciled to her before his Death, she
shall not have her Orphanage Share of his Personal Estate;
and it would be unreasonable to take the Custom to be
otherwise.

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Wall

Wall versus Thurborne.

Cafe 352.

Eodem die.

In Court

Lord Chancellor.

SIR *George Crooke* having three Daughters only, by his Will directs, that his Lands shall descend and come amongst his Daughters, in such Shares and Proportions as his Wife by Deed in writing should direct and appoint. The Wife makes an unequal Distribution, and having given little to the Plaintiff, she brought her Bill, and insisted, that the giving the Wife such Power by the Will was intended only to keep her Children in Obedience; and the Plaintiff having behaved her self dutifully, she ought to have an equal Share.

A. directs his Lands shall descend to his 3 Daughters, in such Shares and Proportions as his Wife by Deed shall appoint.

She makes a very unequal Distribution. Whether Equity will relieve against it.

Post Cafe 392.

To this the Defendant pleaded the Will, and that the Wife, in pursuance of such Power, had by Deed executed appointed so much to one Daughter, and so much to the other; and tho' the Deed was with Power of Revocation, yet it was never actually revoked.

As to the Power of Revocation, the Cafe may be eased of that, for it was only an Authority in the Wife, and that being once executed, she could not reserve such Power to herself. And as to the main Point, whether the Wife might make such an unequal Distribution or not, the Court would not now determine upon the Plea, but ordered it should stand for an Answer, with Liberty to except: But declared the Circumstances must be very strong, as something of Bribery or Corruption, that would take away this Power that was given to the Wife by the express Words of the Will.

A Person having only an Authority can't annex a Power of Revocation, when he executes it.

For the Plaintiff was cited the Cafe of *Cragrave* and *Perroft*, where a Man having two Daughters, one by a former Wife, and another by his second Wife, devised his Estate to his Wife to be distributed between his Daughters, as his Wife should think fit; and she gave *one thousand Pounds*

Pounds to her own Daughter, and but 100*l.* to the other; and the Court there decreed an equal Distribution.

On the other Side was cited the Case of *Swetnam* and *Woolaston*, where an Estate was devised to a Man to distribute the same amongst his Nephews and Neices, as he should think fit: and one of the Neices, to whom nothing had been appointed, brought a Bill, that she might have an equal Share of the Estate, and was dismissed.

Case 353:

27 Januar.

In Court
Lord Chancellor.

A Term kept on foot to protect a Purchase. If Equity will remove it in favour of a Dowress, who has recovered at Law.

Ante Case 171.

Lady Bodmin versus Vande-bendy.

THE Defendant for 4400*l.* purchased of the *Lord Bodmin* the Reversion (after the Death of the *Lord Warwick*) of Lands of near 1000*l. per Ann.* and for Protection of the Estate, and to prevent the Plaintiff's Dower, the Defendant upon his Purchase took an Assignment of a Term for Years, which was vested in Trustees to secure the Payment of certain Annuities, and afterwards in trust to attend the Inheritance; and likewise took an Assignment of an ancient Statute, that had been kept on foot for the Protection of the Estate.

The Plaintiff had recovered Dower at Law, but was prevented from taking out Execution by reason of this Term and Statute; to be relieved against which, and to be let into Possession of her Thirds, was the end of the Plaintiff's Bill.

The Defendant insisted he was a Purchaser, and that he ought to have the Benefit of this Term and Statute for the Protection of his Purchase.

For the Plaintiff it was insisted, That *Equitas sequitur Legem*, and that Dower in the Eye of the Law was as much favoured as a Purchaser; and therefore where a Tenant in Tail dies without Issue, whereby the Estate, which was in
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the Husband, is determined, yet the Dower continues; and that a Woman for her Dower comes not in the *post*, as has been objected, but it is a Continuance of the Husband's Estate: and tho' a difference has obtain'd and been allowed betwixt a Jointress that comes in by the Act of the Party, and a Woman that by operation of Law becomes intitled to Dower; and that the former shall have the Benefit of a Term limited to attend the Inheritance, and not the latter, yet in truth there was no ground in Reason for such a Difference; for tho' a Jointure may be made in respect of a Portion, yet Marriage it self is a sufficient Consideration, and so esteemed in Law; & *fortior* & *æquior est dispositio legis quam hominis*.

Secondly, The original Intent in creating this Term was only to secure the Payment of Annuities, and that particular Intent being satisfied, this Term ought not to be longer kept on Foot; and this Reason was enforced from the Judgment given in the Cause between *Hall* and *Dench*, where a Man having by his Will devised his Lands in Fee to *I. S.* and afterwards having occasion for Monies mortgages the same Lands in Fee to *I. N.* it was decreed that this Mortgage was not an absolute Revocation; but that the Devisee should have the Benefit of Redemption, the Mortgage being only for that particular Purpose to supply the Mortgagor's present Occasions with Monies. And so in this Case, the particular Ends in raising this Term being answer'd, it ought not to be made use of to keep the Plaintiff out of her Dower: and they cited the Case of the *Attorney Gen.* and *Thrupton*, where it was adjudged, that the Inheritance escheating, tho' the King by escheate comes in the *post*, yet he should have the Benefit of a Term limited to attend the Inheritance; and urged that in case there was a Term raised of Lands in *Gavell kind* to attend the Inheritance, that Equity would distribute this Term amongst all the Heirs in *Gavell kind pro rata*; and it was further urged, that the Circumstances of this Case were of great weight in Equity; the Defendant was a Purcha-

Ante Case 84.
133. 179.

Where Lands
escheate to the
King, he shall
have the Bene-
fit of a Term
to attend the
Inheritance.

for with Notice of the Plaintiff's Title to Dower, and that he took Advantage of the Lord *Bodmin's* Extravagance, and that the Value in respect of the Consideration paid was in it self very exorbitant, viz. the Reversion of 1000 *l. per Ann.* after the Death of the Lord *Warwick*, who died within a Year after the Purchase, for 4400 *l.* so that it might be reasonably presumed, that the Defendant had an Allowance made him in his Purchase in respect of the Plaintiff's Title to Dower; and it is a common Case in Equity, that where a Purchaser has an Allowance in respect of an Incumbrance, this shall make the Incumbrance good, tho' it was before defective; and the Lady *Bodmin* here brought a great Portion, at least 30000 *l.* and these Circumstances make this Case much different from that of *Pheasant* and *Pheasant*, for there the Plaintiff had by the Decree of this Court her whole Portion restored to her, it having been lodged in the Chamber of *London*, and the Property not altered by her Husband; and there was therefore the less Reason to incline a Court of Equity to relieve her against the Term that prevented her Dower; and in that Case she had not actually recovered Dower, as the Plaintiff here has done.

1 Ch. Rep.
181.

For the Defendant it was insisted, that this was a Case that must frequently happen, and yet there was no Precedent where a Plaintiff had been relieved in such a Case; but on the contrary the Case of *Pheasant* and *Pheasant* was express in Point, and adjudged that the Plaintiff should not be relieved: And as to the Circumstances of a great Portion brought by the Plaintiff, and that the Defendant had purchased at an under Value, by which they would difference this Case from that, it was answered, that those were bare Suggestions, and not a word proved of it in the Cause, and therefore not to be regarded. But what was chiefly relied on by the Defendant's Council, was the Inconvenience that might ensue, should Relief be given in this Case: That it would alter the course of Conveyancing, and overthrow many Purchases, it having always
been

been looked upon as a good Security to a Purchaſor, and a ſufficient Protection to his Eſtate, where there was an antient Term kept on Foot; and frequently in ſuch Caſes to avoid Charges they never inſiſt on a Fine or common Recovery: And if ſuch a Term ſhall be ſet aſide for a Dowreſs, why not for any other Incumbrance?

The Court inclined to relieve the Plaintiff, and therefore in regard the equitable Circumſtances of a great Portion and the Purchaſe at an under Value were not in Proof, the *Lord Chancellor* referred it to a Maſter to examine, and to ſtate the Caſe to the Court.

Note, The Plaintiff's Bill was afterwards diſmiſſed, and upon an Appeal to the Houſe of Lords the Decree of Diſmiſſion was affirmed. Vid. Caſes in Parliament fo. 69.

Cox verſus Foley.

Caſe 354.

3 Februar.

At the Rolls.

THE Bill was to be relieved touching two ſeveral Rents purchaſed by the Plaintiff of 3 s. and 2 s. *per Ann.* iſſuing out of Lands, the Bill ſuggeſting the Rents had been conſtantly paid Time out of Mind, but that they could not recover at Law, not knowing the Nature of the Rent, whether *Rent charge*, *Service* or *Rent Seck*, and the Boundaries of the Land being uncertain; ſo that they could not at Law declare with that Preciſeneſs as was required in an Avowry: And ſeveral Precedents being produced, where the Court had relieved in theſe Caſes, and, amongſt others, Sir *William Beverſham's* Caſe, who had a Decree for a Rent of 1 s. 3 d. *per Ann.* the Court declared they would decree the Rent, if it had been conſtantly paid; but the Defendant deſiring the Matter might be tried at Law, an Iſſue was directed to try whether any and what Rent was iſſuing out of all or any the Lands in the Bill mentioned.

Bill in Equity lies for recovering antient Quit Rents, tho' very ſmall, as 2 s. or 3 s. *per Ann.* and if proved to be conſtantly paid, the Court will decree Payment, or will direct an Iſſue to try whether any, and what Rent is iſſuing out of all or any of the Lands in the Bill.

Case 355.

Februar. 1685.

Sir John Trevor
Master of the
Rolls.*Usher and Prime versus Ayleworth, Edmonds
& al'.*

IN 1669, *Bromwell* and *Webb* took two Building Leases of Tofts of Ground in *London*, one from the Trustees of *St. Bartholomew's Hospital*, which was taken in *Kemson's* Name, and the other from the Trustees of the Parish of *St. Michael Cornhill* in *Parsons's* Name, upon which *Webb* and *Bromwell* built several Houses, and therein *Bromwell* disbursed considerably more than *Webb*. In 1675, by Indenture between *Kemson*, *Webb*, and *Bromwell*, wherein reciting that *Kemson's* Name was used in the Lease from *St. Bartholomew's Hospital* in Trust for *Webb* and *Bromwell*, their Executors, &c. and that the Tofts were the proper Purchase of *Webb* and *Bromwell*, and the Houses thereon were built at their Charges, *Kemson* for 5 s. assigns that Lease to *Webb* and *Bromwell*, *habend'* to them, their Executors, &c. and they covenant to save *Kemson* harmless from the Rent therein reserved. The 23d June, 1669, *Parsons* assigns his Lease to them likewise.

Webb and *Bromwell* received the Rents and Profits during their Joint Lives; and in June 1678 *Bromwell* died, and made his Wife Executrix, who proved the Will. One *Hyban* upon a *Testat' fier' fac.* to the Sheriff of *Middlesex* seized the Houses in Question, which (19 February 1679) were sold by the Sheriff to *Hyban*; and *Hyban* and *Bromwell's* Executrix, for 240 l. paid by Plaintiff *Usher*, assigned all their Interest in Law or Equity to the Plaintiff *Prime* in Trust for *Usher*.

Ten Days after *Bromwell's* Death, *Webb* assigned *St. Bartholomew's* Lease to *Francis Edmonds* for 800 l. Debt, which *Webb* owed him: Afterwards *Edmonds* died, and the Defendant *Edmonds* took Administration to him: *Webb* became a Bankrupt in July 1679, and the Commissioners

the 3d of December 1679, reciting *Kempson's* Lease and *Bromwell's* Death, and that the Right survived to *Webb*, assigned that Lease to the Defendant *Edmonds* for his Share of his Intestate's Debt of 800 l. owing by *Webb*; and *Edmonds* enjoyed till *Midsummer* 1684.

The Defendant *Ayleworth* swore by his Answer, that he went with one *Waile* (who deposed so also) to *Bromwell's* Executrix, to know if she or any other claimed Title to the Premises, and whether there was any Deed to prevent Survivorship; who said she claimed nothing therein, and that he might safely proceed in the Purchase; and thereupon (June 24, 1684) *Edmonds* for 410 l. really paid by Defendant *Ayleworth*, assigned *Hempson's* Lease to *Ayleworth*; and *Ayleworth* denied that he knew or heard of the Plaintiff's Title before his Purchase; and *Ayleworth* by his Answer confessed the having of *Kempson's* Assignment, and the Declaration of Trust put therein, and confessed that the Lease to *Parsons* was not assigned to him by the Commissioners, nor by *Edmonds*, by any express Words; yet conceived it did pass; for that the Buildings were intermixed upon both Tracts of Ground, and that one could not be enjoyed without the other.

The Plaintiff and Defendant both of them proved their Money paid; and the Question in this Case was, whether the Plaintiff should be relieved against the Title by Survivorship?

For the Plaintiff it was insisted, that Survivorship was against Equity, and that by the Justice of this Court, if two joint Purchasers pay Share and Share alike for a Purchase, and one dies, his Representative shall be relieved against the Survivor for a Moiety of the Purchase; and that in the present Case there would be no doubt, but that if *Bromwell's* Executor had sued *Webb* for a Moiety, she must have been relieved against him, and so must the Plaintiff also as her Assignee; and that if there was an Equity fixed upon the

If two Joint Purchasers pay an equal Share of the Purchase-Money, this makes them Tenants in common in Equity.

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Deeds

Deeds by the Assignment and Declaration of *Kempson* between the Joint Tenants to prevent Survivorship, as most certainly there was, the Defendant's Pretence of Ignorance of the Plaintiff's Title would not justify his Purchase against it; for that he purchasing under *Kempson's* Assignment, must be subject to that Equity which did thereby arise against Survivorship; and that he did apprehend there was such a Title lying out, appears by his Discourse with *Bromwell's* Executrix: And therefore he should not have proceeded therein upon her saying she claimed no Right, or that he might safely proceed; for that such Discourse was after her Assignment to the Plaintiff, and so would not turn to his Prejudice. Yet nevertheless the Defendant being a Purchaser, tho' under these Circumstances, the *Master* of the *Rolls* dismissed the Bill without Costs; and the rather, for that the Plaintiff did not bring the Bill till after the Defendant's Purchase, tho' the Plaintiff's Purchase was made two Years before.

Cafe 356.

Februar. 1685.

Lord Chancellor.

John Huckstep versus *Dorothy Mathews*
and *John Court*.

Devise of Lands to Trustees in Fee in Trust to pay Debts and Legacies, and after these paid then to sell; and if any of the Testator's Name would buy it, such Person to have it for 200 l. less than the Value.

One of Testator's Name brings a Bill for this Praemption; but delays bringing it until 25 Years after Testator's Death. Bill dismissed.

JOHN *Huckstep* (whose Father and the Plaintiff were Brothers) in December 1685 made *John Mathews* and *Benjamin Court* Executors of his Will, and gave them thereby the Revenues of all his Lands till his Debts and Legacies were paid, and after Payment thereof gave the Lands to them and their Heirs, upon Condition that if any of the Name of *Huckstep* would purchase them for his own Use, then his Will was that *Mathews* and *Court* should sell the same to him for 200 l. less than the reasonable Value thereof.

The Executors proved the Will, and enjoyed jointly for 10 Years, and then *Court* died, and *Mathews* received the whole Rents, which with the Personal Estate were more

more than enough to pay the Debts and Legacies; and the Plaintiff being of the Name of *Huckstep* brought his Bill, and prayed a Conveyance of the Lands for 200 l. less than they were worth to be sold.

The Defendants demurred, for that the Will was made above *twenty five* Years ago, and it was uncertain to whom the Sale ought to be made, and *Mathews* and *Court* (who, if the same were to be sold, were to sell the same) are both dead; which Demurrer being heard before the *Lord Keeper North*, he ordered the Defendants should answer the Bill, and saved the Benefit of the Demurrer to the hearing.

And now the Cause came on before the *Lord Chancellor*, and the Defendants by Answer insisted that *Court* being dead, *Mathews* after his Death had levied a Fine of the Premises, and made a Settlement thereof, under which the Defendants now claimed; and that there were above five Years past since that Fine was levied before the Plaintiff brought his Bill, tho' the Plaintiff lived always within a Mile of the Place, where the Testator died. And the *Lord Chancellor* conceived, that the Plaintiff's Bill being brought *twenty five* Years after the Testator's Death, what was prayed thereby was unreasonable, and therefore dismissed the Bill.

Suppose two Persons named *Huckstep* had at the same time claimed the Benefit of this Devise, which should have it?

Thomas Butcher versus *Stapely* and *Richard Butcher*.

Case 357.

10 Februar.

Lord Chancellor.

A Parol-agreement for a Purchase and Possession delivered, decreed to be

THE Defendant *Butcher* being seized of the Lands in Question, which he had mortgaged to one *Colstock*

for

performed against a subsequent Purchaser with Notice, who had a Conveyance, and paid his Money.

for 400*l.* agreed with the Plaintiff to sell the same to him for 700*l.* A short Note was drawn up of the Agreement (but not signed by either Party) as follows: *December 9th, 1682, Richard Butcher* for 740*l.* does bargain and sell unto *Tho. Butcher* all those Lands, &c. the Plaintiff to have them from *Lady-day* next, and then the Monies to be paid; the Plaintiff to have the Hogg Pound, and Dung, and the Defendant to pay all Taxes, &c. and is not to cut any Trees, nor to put any Cattle on the Premises, and is to have the Corn in the Barn, &c. and to avoid it so soon as he can: The Lands are in Mortgage to *Colstock* for 4000*l.* and the Plaintiff is to pay for the Writings. Soon after this Agreement the Plaintiff puts in his Cattle and makes Incroachment on the Defendant *Butcher's* other Lands; thereupon the Defendant to prevent Differences desires the Plaintiff to repeal the Bargain, which he refusing, the Defendant told him he should not have the Bargain, and advised him not to procure any Monies to pay for it, and drove the Plaintiff's Cattle off the Ground, and soon after sold the Lands to the Defendant *Stapely* for 740*l.* and the 3 *February, 1682*, sealed Articles for that Purpose, and a Bond of 1000*l.* to perform the same. The 26 *March, 1683*, the Plaintiff tendered his Purchase-mony and Writings to seal, which the Defendant refus'd, and the 28th of the same Month *Stapely* paid *Butcher* 240*l.* and took a Conveyance of the Estate free from Incumbrances, except a Mortgage; and in *June* after paid off the Mortgage, and took an Assignment of it to a Friend of his own.

The Bill was to have the Bargain and Agreement between the Plaintiff and Defendant *Butcher* decreed, and charged *Stapely* with Notice of that Agreement before his Purchase, which *Stapely* and *Butcher* denied by Answer; nor was there any direct Proof of Notice, save that some Neighbours in Discourse did say, they had heard the Defendant *Butcher* had sold the Estate to the Plaintiff.

For the Defendant *Stapely* it was insisted, that there was no sufficient Proof of Notice of the Plaintiff's Agreement, and that if there was Notice, yet the Agreement was not perfect nor binding by the Act against *Frauds* and *Perjuries*, it not being signed.

The *Lord Chancellor* declared, that in as much as Possession was delivered according to the Agreement, he took the Bargain to be executed, and that *Stapely* had Notice of it, and that it was a Contrivance between the Defendants to avoid the Bargain; and therefore decreed the Defendant *Stapely's* Bargain to be set aside, and that *Stapely* should execute a Conveyance to the Plaintiff upon Payment of 700 *l.* and Interest, and the Defendant *Stapely* to procure a Conveyance from his Trustee the Assignee of the Mortgage.

Edward Allen versus Henry Arme.

Case 358.

Februar. 1685.

Lord Chancellor,

THE Plaintiff *Allen* being a Servant to the Defendant's Grandmother, married one of her Daughters, who brought him a Portion of 600 *l.* with part of which he purchased the Copyhold Lands in Question, which were surrendered to the Use of the Plaintiff and his Wife, and the Heirs of their two Bodies, the Remainder to himself in Fee. The Wife soon after died without Issue; and the Plaintiff, with respect to her Memory, and in kindness to the Defendant her Nephew, did voluntarily surrender the Lands to the Use of himself for Life, with Remainder to the Defendant in Fee; and the Defendant was admitted to the Remainder in Fee, and paid 5 *l.* Fine. The Plaintiff afterwards married again, and his Bill was to be relieved against this Surrender, as obtained by Surprise and without Consideration.

A voluntary Surrender, made by a Man in his Sickness, good against his Wife and Children, who claimed under a subsequent Surrender made upon his Marriage after Recovery of that Sickness.

The Cause was at Issue, but no Surprise proved; the Bill abated by the Death of the Plaintiff and Defendant both;

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and

and the Plaintiff's Wife, in behalf of herself and her Son by him, brought her Bill, in the nature of a Bill of Revivor (suggesting a Settlement on her Marriage of the Cophyhold Lands upon her and her Issue) against the Defendant's Widow, who claimed by Surrender from her Husband.

And upon the Hearing (no Surprize being proved) it was insisted for the Plaintiff, that the Surrender was made (as indeed it was) by the Plaintiff's Husband in the time of his Sicknefs, and therefore it must be intended by him not to bind, in case he recovered of that Sicknefs, it being meerly voluntary, and that his Intentions appeared so by his having after his Recovery settled the same before his Marriage on the Plaintiff his second Wife and their Issue, who were to be taken to be Purchasors, and ought therefore to be relieved against that voluntary Surrender.

But the *Lord Chancellor* declared, he saw no Equity in the Case, nor could he infer any Intention by any Circumstances in it contrary to the Surrender, and therefore dismissed the Bill, there not appearing any Fraud or Trust in the Case.

Case 359.

19 Februar.

At the Rolls.

A. purchases in the Name of *B.* and pays the Purchase-mony. *B.* claims the Estate, there being no Declaration of Trust. *A.* may be admitted to read Proofs, that he paid the Purchase-mony, but then those

Gascoigne versus Thwing & al.

THE Bill was, that Sir Thomas Gascoigne in October 1678 purchased a great Manor-house and about four Acres of Land in *Com' Ebor'*, and took the Conveyance in the Name of one *Varvasor*, who had assigned to the Defendant *Thwing*; and it was suggested, that the Estate was bought with the Plaintiff's Mony, and was upon Trust, that one *Eliz. Thwing* deceased should enjoy it for her Life, and then in Trust for the Plaintiff and his Heirs, who by the Bill prayed the Estate might be conveyed to him.

The

The Defendant by Answer denied he knew it was bought with the Plaintiff's Mony; but believed it was bought with the proper Mony of the said *Eliz. Thwing*, and that the Conveyance was in Trust for her and her Heirs; and he claimed it as Heir to her, and insisted on the Statute of *Frauds* and *Perjuries*, there being no Declaration in Writing of any Trust for the Plaintiff.

Proofs must be very clear to make it a Trust arising by Implication of Law.

The Chief Point was, whether when a Man purchases Land with his own Mony, and takes the Conveyance in another Man's Name, this is such a resulting Trust by Implication of Law, as is saved by the Statute, and needs no Declaration of Trust.

And after long Debate, whether the Plaintiff should be admitted to read, to prove the Mony was his, the Proofs were read; and they amounting only to what had passed in Discourses, and been owned by the Defendant, and the Proofs being doubtful, the *Master* of the *Rolls* dismissed the Plaintiff's Bill, because the Proofs were not sufficient whereon to ground a Decree; and said, there was some Secret in the Cause, which he did not fully apprehend, and was not made clear upon the Proofs. Now the truth of the Fact was, that this great House was bought with a Design to make a Nunnery of it, and the said *Eliz. Thwing* was to be the Lady *Abbess*; and that Project failing, the Defendant set up for himself.

Ass versus Rogle and the Dean and Chapter of St. Paul's.

Cafe 360.
Lord Chancellor.
Master of the
Rolls.
Eodem die.

THE Bill was brought by a Remainder-Man after an Estate Tail spent, to be relieved against an erroneous Recovery of a Copyhold Estate in a Court *Baron* suffered above *thirty* years ago; and the Relief sought was, that the Dean and Chapter, who were Lords of the Manor, might

Bill brought by a Remainder-Man in Fee, of a Copy hold expectant on an Estate Tail which was

spent, to be relieved against an erroneous common Recovery in the Lord's Court.

Praying that the Lord may be decreed to suffer Plaintiff to bring a *Plaint* in the Lord's Court in nature of a Writ of Error to reverse this Recovery, or that this Court would relieve on the Merits The Defendant demurred, and the Demurrer was allowed.

might be decreed to suffer the Plaintiff to bring a *Plaint* in the nature of a Writ of Error or false Judgement, in their Court *Baron*; or else that he might be relieved upon the Merits of the Cause by the Decree of this Court.

The Estate had been enjoyed under the Recovery ever since, tho' the Estate Tail was spent many Years ago. The Defendant *Rogle*, who claimed the Estate under the Recovery, demurred; For that it would be of dangerous Consequence to all Persons, who claimed under Recoveries of Copyhold Estates, to draw the same in Question in this manner: for that through the Ignorance of Stewards of Copyhold Courts, it frequently happens, that all the legal Requisites to a common Recovery of Freehold Lands were not observed in Recoveries of Copyhold Estates; and yet the barring of Copyhold Estates by Recoveries in such Courts having obtained in many Manors, it would shake many of them, if upon Niceties in Form they should be impeach'd: and insisted, there was no Precedent, that any Relief in such Case was ever given in this Court; and that it was better to suffer a particular Mischief in this Case, than by relieving it to make a Precedent of general Inconvenience to Owners of such Estates.

The Dean and Chapter answered the Bill, and submitted to do as the Court should direct.

This Demurrer was first argued by learned Serjeants at Law and Council on both Sides solemnly, before the *Master* of the *Rolls*, who allowed the Demurrer; and afterwards being re-argued before the *Lord Chancellor*, he was of the same Opinion, and confirmed the *Master* of the *Rolls's* Order; both of them severally declaring, it would be of dangerous Consequence, and contrary to Equity, to give any Relief in such a Case: And yet the Errors assigned by the Bill in the Recovery were such, as would have been gross Errors in a Recovery in a Freehold Estate: and the *Lord Chancellor* said, if there had been an Error in any Adversary Pro-

Proceedings in the Lord's Court, this Court would have ordered the Lord to proceed and examine it. You may try the Common-Law Courts, whether they will grant you a *Mandamus*: You shall have no Aid from this Court.

Bellasis versus Benson.

Cafe 361.

27 Februar.

THE Bill was to be relieved touching the Plaintiff's Jointure, which the Bill charges was by Parol Agreement made on the Marriage agreed to be 400 *l. per Ann.* The Defendants plead, that after all Treaties and Agreements touching the Marriage-Settlement, a Jointure was actually settled and accepted, and the Marriage thereupon had, 18 Years since.

In Court,
Lord Chancellor.

A Settlement of a Jointure actually made is an Evidence that all Parol Agreements before the Marriage were resolved into that.

Lord Chancellor. The Jointure-Deed is an Evidence, that all the Precedent Treaties and Agreements were resolved into that; but ordered the Defendants to Answer, and save the Benefit of the Plea to the Hearing.

Bright versus Woodward.

Cafe 362.

Eodem die.

ON Exceptions to a Master's Report, *Lord Chancellor* was of Opinion, that after a Suit commenced here, an Executor shall not be allowed any Payments made voluntarily without Suit.

After a Suit against an Executor in this Court, he shall not be allowed Payments made voluntarily without Suit.

A Commissioner may be a Witness, but then he ought to be examined before any other Witnesses be examined.

A Commissioner may be a Witness, but he must be first examined.

Cafe 363. 26 Februar.
Lord Chancellor
Jefferies.
Lord Chief Justice Jones.
Lord Chief Baron Mountague.

Sir Robert Sawyer Kt. his Majesty's Attorney General, on the Behalf of his Majesty, } Plaintiff.
 Edward Vernon Esq; Rupert Brown and Samuel Boheme, } Defendants.

A Patent of Lands granted by the Crown set aside by Bill in Equity, as unduly got. Ante Cafe 278.

THE Information set forth, that his Majesty was seized in Fee, as Parcel of the Dutchy of Lancaster, of the Honour of Tudbury in Com' Derby, Stafford, Leicester, Nottingham and Warwick, and of the Manor of Tudbury, the Forrest of Needwood, the Offices of High Steward of the Honour of Tudbury, Constable of the Castle and Lieutenant of the Forrest of Needwood, and Bayliff of the new Liberty, and Bayliff of the Castle and Manor of Tudbury, and High Steward of the Lordship and Manor of the High Peake and Mirkersworth, the Office of Steward of Newcastle Under-line, lately granted to William Levinson Gower Esq; and of all those Lands, Tenements, and Hereditaments, Parcel of the Demeasne Lands of the said Castle and Manor of Tudbury demised by his late Majesty to Michael Andrews, and since by his now Majesty to Mary Blagg, and divers other Lands, Privileges, &c. All which Premises are Parcel of the Dutchy of Lancaster, and are one Year with another 20000 l. per Ann. and his Majesty ought accordingly to enjoy the same without Interruption, and to receive the Rents and Profits after the Expiration of the Lease granted of some Part thereof, and is also entitled and ought to have the Benefit of all the Timber and Wood on the Premises, which amounts to above 30000 l. and no Waste or other Prejudice to the Disinheriton of his Majesty ought to be done.

That the Defendants by Combination to deprive and prejudice his Majesty in his Right in the Premises, and to
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commit Waste therein, have lately entered on the Premisses, and began to cut down the Timber, and give out they will cut down all or the greatest Part thereof, as also the *Hollywood* and *Underwood*, to the apparent Wrong of his Majesty, pretending some Title by Descent or Conveyance from some of the King's Ancestors, or that the same or greatest Part thereof is duly granted unto them out of the Crown by his now Majesty; whereas if they have any such Grant the same was obtained by unusual Means, and by Surprise, and ought not to be binding to his Majesty, he being not duly apprized thereof. That about *September 1683*, the Defendants proceeded in a clandestine Manner to deceive his Majesty, by making a colourable Proposal for paying some inconsiderable Sum far short of the real Value, and the getting in the Interest of some Grounds at *Sheirness* for his Majesty, and discharging the Arrears due from his Majesty for the same, which would amount to above 4 or 500 *l.* and yet no Mony has been paid to his Majesty; and the Defendants endeavoured to have the Ground at *Sheirness* estimated at 300 *l.*

That in *October* following, the Defendants petitioned his Majesty for the said Grant, and a Reference to Sir *Thomas Chicheley* Chancellor of the Dutchy, and a Report, was hastily obtained from him in the same Month; and about the 19th of *November* following a Warrant was Signed for passing a Grant of the Premisses, and about two Days after a Grant was obtained under the Dutchy Seal, albeit all Endeavours were used to stop the Grant by his Majesty's express Commands, and by the Order of the Lords of the Treasury on the 19th of *November*, and particular Application was made to the Chancellor of the Dutchy, but in vain, he denying he knew of any such Grant; nor could it be known, till a Particular was found at a Scrivener's Shop about a Month after: Which Proceedings are contrary to the Course that hath always been, and ought to be observed in passing Grants of Inheritance under the Dutchy Seal; for there ought to have been first

a Warrant of the Auditor to make a true Particular to the Surveyors, who return an Estimate, and thereupon and not before a Warrant is granted by his Majesty, and then the Clerk draws up a Grant for the King's Attorney of the Dutchy's Perusal, who upon his approving thereof Signs the Bill with a Docquet, which afterwards being Signed by his Majesty, passes the Seal of the Office; but by the Defendants hasty and unusual Proceedings, there is no such Grant yet registred with the Clerk; nor Inrolled with the Auditor, nor any Footsteps of the Proceedings to be seen in the said Office. That his Majesty is deceived, not only to his Disinheritson, but to the apparent Prejudice of the Crown; and the said Honours, Manors and Forrests being of so great Extents and large Privileges and Royalties, and Multitudes of the Nobility, Gentry, and Freeholders, Copyholders, and others having Dependance there, and being thereby furnished with all Necessaries for Profit and Pleasure, they are most proper to be preserved in the Crown.

That the Defendants obtained the said Grant by untrue Particulars, the Estates in such Particulars being set down of less Value by some 10000 *l.* by the Year than the same are really worth, and the Wood and Timber not valued, tho' worth above 30000 *l.* and the quantity of Acres represented less by some Thousands than they are, and several great Privileges and profitable Matters having no Value at all set on them, as appears by a Particular lately returned to his Majesty by his Surveyor-General, whereby the Premisses are estimated at above 60000 *l.* nor is there any considerable Rent reserved: For all which Causes and other Imperfections the said Grant ought not to deprive his Majesty of the Possession and Right thereto, nor ought any of the Timber to be cut down by Vertue thereof, but such Grant ought to be delivered up and Cancelled; and therefore it was prayed by the said Information, that the Defendants may set forth what Proposals were made to his Majesty for obtaining the said Grant, by whose Interest procured, what Reference was made thereupon, and whether

whether any Report was made, by whom, and how long after the Reference, when the Warrant was Signed by his Majesty, and the Grant passed the Seal, and whether any Enquiry was made after it from his Majesty before it was Sealed, and what Answer was given him, whether any Report was made by the Auditor or Surveyor General, or why omitted, and where were the Particulars signed; whether it is not the Usage of the Dutchy to have all Grants of Inheritance pass, as before is suggested, and why the said Grant passed without observing that Course; for whose Benefit the said Grant was made, and for what Considerations, and the Value of the Premises when the said Grant was passed, and of the Timber and Wood on the same; That the Defendants Proceedings in committing Waste might be staid, and that the said Grant might be Decreed to be delivered up and cancelled, and such further Relief had as should be meet.

The Defendant *Vernon* pleaded his Patent, and that he was a Purchasor; which being over-ruled, he Answered and insisted on his Title; and by Answer set forth, that he believed the late King was seized in Fee, in right of his Dutchy of *Lancaster* (*inter al'*) of the Honor of *Tudbury* and Forrest of *Needwood* and other the Particulars hereafter mentioned to be granted to Mr. *Brown* and *Boheme*, tho' not of such great Value as in the Bill. That the Defendant having several Leases of Parcel thereof, for long Terms at a considerable yearly Rent, as also Offices and Commands within the Forrest and Honor, and having expended great Sums in building and Repairs and otherwise, and the King's Rents having been increased on taking some of the Leases, and the Reversions of some of the Lands therein having been granted to others, and being informed Endeavours were used to obtain the Reversion in Fee of the Lands in Lease and all the rest in the Information with the Rents thereon, the Defendant was induced to draw up a Petition for the King's granting the Premises to

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such as the Defendant should nominate; That he having acquainted the Duke of *Ormond* with his Intentions; and the Duke (as he believes and doubts not but to prove) advised with the Attorney General therein, and obtained the favour to make the King acquainted therewith, the Duke being privy to what the Defendant had done and suffered for the Service of the late King's Royal Father and himself, as also for that the Duke had an Interest in the Premises, of which the Grant was sought, being Steward of the Honor and Constable of the Castle of *Tudbury* and Lieutenant of the Forrest (*inter al*) which are held for the Lives of the Duke and the Earls of *Arran* and *Ossory*, and a Lease of the Scite of the Castle for about 90 Years yet in being.

That he attended the Earl of *Sunderland*, one of the Secretaries of State, with a Petition to the King in the name of *Rupert Brown*, the Defendant's Nephew (whose Name he made use of to prevent a Merger of his Lease) with the Proposal annext (*viz.*) That the King would be pleased to grant to the Defendant the Inheritance of the Honor of *Tudbury* and Forrest of *Needwood*, with the Lands thereto belonging, Parcel of the Dutchy, pursuant to the Proposal annext (*viz.*) to pay to the King 7000*l.* in Mony, to reserve the old Rents and to pay to the King as much as would amount by Increase of Rent and Deduction of Fees to 70*l.* *per Ann.* To convey to the King the Lands whereon the Fort of *Sheirness* was built, with a Release of all Demands by reason thereof, and to keep for his Majesty's Service 1000 Deer for ever clear of all Charges, *prout* Petition and Proposal 29 of *September*.

That the Earl of *Sunderland* signed an Order of Reference to the *Chancellor* of the Dutchy (*viz.*) That his Majesty was graciously pleased to refer the Petition and Proposal to Mr. *Chancellor* of the Dutchy to consider of it, and report what might be fit to be done therein for the King's Service and

and the Petitioner's Gratification, which his Majesty was disposed to, *prout* Order.

That the *Chancellor* having informed himself by Surveys and otherwise (tho' what his Methods therein were, the Defendant knows not) and reported a satisfactory Account thereof, the King signed a Warrant authorizing the *Chancellor* to pass a Grant of the Premises, in the same Words with the Grant hereafter mentioned.

That by Indenture dated the *twentieth* of *November* 1683; duly executed and inrolled between his Majesty of the one Part and the Defendant on the other Part; reciting that *Godfrey Meynell* for 400*l.* had granted to the Defendant and his Heirs all those 23 Acres of fresh and 17 Acres of salt Marsh in the Island of *Shippy*, whereon the Fort of *Sheirness* was erected, and all his Estate and Interest therein; The Defendant granted and released the same and all his Interest to the King, his Heirs and Successors; and all Monies whatsoever which were due or owing to or could anywise be demanded by the said *Meynell* and Defendant or either of them, the Defendant having Power from *Meynell* in that behalf. *Prout* Deed:

That in Consideration thereof and of 7000*l. bona fide* paid by the Defendants or some of them into the Receipt of the Dutchy, and for other Considerations, the King by his Warrant under his Sign Manual in the Words in the Patent hereafter mentioned, and in Pursuance thereof by his Letters Patents under the Dutchy Seal executed by Livery and Seisin, did give and grant *prout* Letters Patents.

Knows not whether by the Usage of the Dutchy Court Grants of Inheritance ought to pass in such Manner and Form as by the Bill is set forth, but believes the Grant was duly passed, and is effectual in Law, and whether or no the Grant was inrolled is not material. Insists

that the Grant ought not to be impeached on Pretence of an Over-value, or the Defendant drawn under an Examination in this Court touching the same; For he avers, That in the Life-time of the late King *Charles the First* he did faithfully and with the hazard of his Life serve him in the late War in Arms, and was by the *Usurper* long imprisoned in the *Tower*, and thereby and otherwise suffered much both in his Estate and Person. That altho' the Patent was taken in the Name of *Brown* to prevent a Merger of the Defendant's Leases, and also in the Name of *Boheme* to prevent *Brown's* Wife from Claiming Dower, yet their Names were purely made Use of at the Defendant's Nomination and in Trust for him and his Heirs, and was granted in Favour of this Defendant at the Instance of his Friends and with respect to his Sufferings, as well as for the Consideration of the Conveyance of the Lands in the Isle of *Sheppy* and the 7000*l.* which the Defendant avers was really paid for the King's Use to *Nathaniel Curson* Deputy Recorder of the Dutchy, *prout* his Receipt.

That in as much as the Grant is of his late Majesty's special Grace, as also for the Considerations before mentioned and in the Grant expressed, the Defendant insisted, the Patent ought not to be impeached under pretence of Surprise, or want of Consideration, or any of the Suggestions in the Bill, for which there is no Ground in the Patent, especially since it is a Grant of the Honor, Lands, &c. in the Bill, which ought not to be impeached by an *English* Bill in this Court, being no Court of Record; and is advised, it would be in derogation of his Majesty's Grants and of dangerous Consequence to all his Subjects, such especially as claim any Estate of Inheritance by Letters Patent, if they should be drawn under Question on such Pretences as in the Information; especially since the Suit wants a Precedent: and if there be Grounds to avoid the King's Grant, they are such as may lie against all that are of the King's favour, and other Considerations: nor can any A-
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verment lye against such Grant, where his Majesty's Grace and Favour is an Ingredient in it.

That the Patent is matter of Record, and good in Law, and that the Common Law ought to determine the Validity thereof; nor ought, nor can a Patent, if a matter of Record, be vacated or cancelled by a Decree or *Englifo* Bill; and the rather for that such Considerations as afore-said have been paid and satisfied, besides the great Charges in passing it; and the Defendant is intituled to the Protection of the Court, as a Purchasor, and the Validity of the Patent ought not to be impeached here, whereby the Defendant may lose the 7000 *l.* and *Shiernes* Lands.

That as to the Particular mentioned to have been returned to the King by his Surveyor General, the Defendant insists that the same being *ex post facto*, no use ought to be made thereof to Impeach the Grant; nor is the same true, but set on foot, not for the King's Advantage, but by some who would Impeach the Defendant's Grant, in expectation of a Grant thereof to themselves, most of the Particulars thereof being valued at excessive Rates, and many thereof being in Jointure to *Queen Dowager* with a power of filling up Leases for 31 Years at any time during her Life; and as appears by the Particular, the Surveyor has taken many things by hearsay and by the relation of others, who would Impeach the Grant, and great Values are there put upon Reversions after long Leases on inconsiderable Offices, such as were never valued in a Purchase; as the Offices of Steward, Bailiff and the like, the Profits whereof will scarce answer the Trouble of any that are capable to be trusted therewith: and the Surveyor has computed the Soil of the Forrest at 27200 *l.* upon a supposition that the Forrest may be inclosed: Whereas there are several Persons of Quality and Worth, that have Charters and claim Estovers and right of Common through-

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out the Forrest. And whereas in the late Wars there was an Ordinance for inclosing it, yet the same could not be effected without an armed Force, much less is it probable that this Defendant should compass it. Neither is the Surveyor's Valuation of the Timber less extravagant, being computed at 30000*l.* and he is mistaken in Quantity and Value, as may appear by two Surveys taken in the late times with more exactness, the one in 1650, which values the Wood and Timber at 13591*l.* 18*s.* the other in 1658, where they are valued at 12284*l.* 18*s.* 2*d.* out of which Estovers were to be allowed *prout* Surveys: And afterwards Timber to the Value of 3098*l.* 9*s.* were cut down and sold by the Usurpers; and the Wood in the Forrest was certified in 1662 and 1663 by the late Lord *Seymour* and the Officers of the Forrest to be worth about 12000*l.* and believes they really thought it worth no more; and much of the Timber has been since cut down and carried away by several Grants from the King, and many of the best Trees have been picked and culled out, for such as claim Estovers; the Earl of *Devonshire* claiming (*int' al'*) 3 Cart Load of Wood from the Exaltation till the Invention of the holy Cross once a Year, and as much Timber as was necessary for building and repairing old Houses and Tenements formerly belonging to the Prior and Convent, and the tenth Penny and part of all Timber sold within the Chase, and other Tythes and Perquisites, *prout* the Earl's Answer in the Dutchy.

That considering the Matters before, as also that the Country there abounds with Timber, and no navigable River near, much of the Timber to be preserved for Estovers, and Holleys, and Underwoods, and other Woods are to be preserved for the Deer, which the Defendants are obliged to keep; The Surveyor's Report will appear to be grounded on Mistakes, and made up of extravagant Computations, and imaginary Values.

That the Honour of *Tudbury* was formerly of a great Extent and Dependancies, yet it is not now of such Consideration to the Crown, as the Bill surmizes, being dismembered and reduced to a narrow Compass: the most considerable Manors and Lands formerly held of it being transferr'd and held of others of the King's Manors, and particularly 6 Car' I. (*int al'*) the Inheritance of the Manor of *Brasington*, *Boutesball*, *Sherrald Park* and Lands in *Tudbury* were granted to *Charles Harbord Esq;* & *al'* in Consideration of 2207*l.* in Mony and a Debt of 2350*l.* and of the King's Grace, which are of the Value of 3000*l.* per Ann. (as informed) and are held of the Honour of *Enfield*.

Denies the late King was surprized or deceived in the passing of the Grant, or that any false Particulars were delivered to the King by the Defendant or any other to his Knowledge, or that the King was misinformed (unless by the Particulars of the Surveyors General in the Bill) of the Quantity or Value of the Premises, but believes the contrary. Denies he knows or believes that there was any Order or Direction by the late King or Lords of the Treasury for the hindering or stopping of the Grant, or that any Order or Message for that Purpose was sent or delivered to the *Chancellor* of the Dutchy on the 19th of *November* 1683, or before the passing thereof: but if such had been, the *Chancellor* of the Dutchy (as believes) would have obeyed it; and believes it altogether untrue, and without ground; for that (as informed) the King for a considerable time after the Grant was passed expressed himself to be well satisfied therewith, and declared he designed the 7000*l.* Consideration for a particular Use (as informed and believes) and has heard that a Month after the Grant passed there was a Paper left with the *Chancellor's* Secretary (*viz.*) Let no Grant pass of *Castlehay Agardsley* little Park and *Hanbury Park*, the Castle of *Tudbury*, and the Raingership of *Needwood Forrest*, till notice to my Lord *Dartmouth*, his Lady, or Mr. *Richard Grahme*.

Denies

Denies any Endeavours were used by him or any to his Knowledge to have the *Sheirnes* Lands valued at 3000 *l.* or a greater Sum than the real Value; the Consideration paid by the Defendant for the same appearing in the Grant, tho' he believes he bought the same at a great Under-value.

Believes after the Grant passed, a Particular of the things thereby granted, as well as of the Defendant's Leases, and Estates therein, might be left by the Defendant *Brown* at a Scrivener's in *London* to procure 10000 *l.* thereon for the Defendant; but the same was not thought a sufficient Security; and the Defendant being thereby disappointed, and the Defendant *Brown* having advanced and become bound with the Defendant for several Sums, it was agreed between them, that *Brown* should become a Purchaser of a full Moiety of the Premises for 7000 *l.* (which was the 7000 *l.* paid to the late King) and should discharge the Defendant from all Engagements that he stood bound in for raising thereof, and that *Brown* should lend the Defendant 3300 *l.* on a Mortgage of the other Moiety; and thereupon this Defendant, the Defendants *Brown* and *Boheme*, by good Assurance well executed by way of Lease and Release, conveyed the Premises to Mr. *Serjeant Birch* and his Heirs; as to one Moiety thereof, to the Use of *Brown* and his Heirs, and as to the other Moiety to the Use of *Birch* and his Heirs, in trust first by Sale or Profits to raise and pay the 3300 *l.* with Interest to *Brown*, afterwards for Payment of the Defendant's Debts, and afterwards in trust for the Defendant and his Heirs.

Denies he has committed any Waste or felled any Wood since the Grant, tho' he says by several Leases to him made of part of the Premises, there are Boots granted to him, and Timber for new Buildings and Repairs.

The Answer of the Defendants Brown and Boheme.

Rupert Brown believes the late King was seized, in right of the Dutchy, of the Honours, Manors, &c. in Bill; and the Defendant *Vernon* informed him, he had a Promise from the King of a Grant thereof, in Consideration of a Conveyance of *Sheirness* Lands, and of 7000*l.* That the Grant being agreed to be taken in the Name of the Defendant *Brown* and the Defendant *Boheme* his Servant, the Defendant *Brown* at the Defendant *Vernon's* Request advanced and paid the Monies. That the King in Consideration thereof, and for other Considerations in the Patent mentioned, by Letters-Patents under the Dutchy Seal, whereon Livery was executed, under the Rents and Covenants therein, granted to the Defendants *Brown* and *Boheme* and their Heirs the Premises in the Words therein *prout*; that afterwards, at the desire of the Defendant *Vernon*, the Defendant *Brown* lent at Interest to him the Sum of 3000*l.* which, with 300*l.* before due to *Brown*, together with Interest for the same. was agreed to be secured on part of the Premises, which Part was for that Purpose conveyed to *Edward Birch* Esq; named by the Defendants *Brown* and *Vernon*; the Estate in Law of the rest of the Premises being then settled to the Use of *Brown* and his Heirs, in consideration of the 7000*l.* which was paid with the Defendant's proper Monies to Mr. *Curson* Receiver or Deputy Receiver of the Dutchy, *prout* Receipt.

That for the 7000*l.* and 3300*l.* the Defendant is a real Purchasor of the Premises; besides the Defendant hath been put to great Charges for drawing of Writings, Advice of Council and other matters relating to the Premises.

Both say, that as to the Ways or Means of obtaining or passing of the Grant (other than the paying the 7000*l.* and conveying *Sheirness* Lands) they are ignorant, being

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transacted

transacted by the Defendant *Vernon*, to whom the King intended a considerable Reward. *Brown* insists that the Grant is good in Law, and ought not to be impeached on the Suggestions in the Bill in a Court of Equity; and cannot give any Account of the Proposals or Proceedings in obtaining or passing the Grant, being managed by the Defendant *Vernon*, and the Defendant concerning himself no further than the paying of the 7000 *l.* and seeing the Conveyance of *Sheirness* executed. Conceives the Court will be very tender to examine any of the Methods or Means, how such Grant came to be passed, when it hath received the Allowance of the proper Officer. That the Defendant hath paid in part of the Rent reserved on the Patent to *Curson*, for the King's Use. 6 *l.* 11 *s.* 9*d.*

And the Defendant *Boheme* says, that he being a Servant to the Defendant *Brown* is a Stranger to the Premises, further than that his Name was made use of in the Patent, and disclaims any Interest in the Premises.

The Proofs as to the Values were very various; and the Surveyor General's Survey, which made it amount to 60000 *l.* was reduced to one half, even by the Attorney General's own Proofs. *Vernon* proved the Surveys and all the Matters in his Answer fully; so that upon weighing the Proofs on both sides, the extremity of the full Value did not amount to 20000 *l.* *Vernon* proved his Majesty's Order of Reference 29 September 1683, from the Lord *Sunderland* principal Secretary of State, to the Chancellor of the Dutchy, and the 19 November 1683 the Warrant signed *Charles Rex*, and countersigned by the Chancellor of the Dutchy; and the 20 Novembris 1683 *Vernon's* Conveyance of the Land at *Sheirness* to the King inrolled: and the 21 Novembris 1683 the Patent passed the Dutchy Seal. The Attorney of the Dutchy proved the Methods of passing Grants, but that when by the King's immediate Command the Lands are ascertained, the Estate limited, and Rent fixt, (as it was here) Grants have

have passed by Privy Seal or Signet. The Duke of *Ormond* proved a Letter writ by himself, and sent by *Vernon* 29 August 1683, to the Attorney General, signifying, that he had left *Vernon's* Proposals with the Lord *Rochester* the first Commissioner of the Treasury, and that the Attorney's Answer was, such Grant might be legally passed; and that the King declared to the Duke he intended a Kindness to *Vernon* by the Grant, and was well satisfied with it, and did not express his displeasure, till the Country Gentlemen petitioned against it; and he and the Earl of *Ardfglas* and others fully proved *Vernon's* Service and Sufferings for the Crown, his being a Colonel in the time of the Rebellion, his supplying the King with 2000*l.* in his Exile, and other signal Services, which the King often owned, and his being many Years imprisoned under *Cromwell* in the Tower, and in danger of being put to death in endeavouring the King's Restoration.

For the King it was argued, that an *English* Bill was the proper Remedy in this Case, for that no *Scire fac'* would lye, it not being a Record of this Court; and if it would, yet a *Scire fac'* would not reach this Fraud, it not appearing within the Body of the Grant; and Equity here did but follow the Law; many Things even at the common Law being such Surprizes, as should avoid Letters Patents in a *Scire fac'*; and if a Man had been so cunning, as to avoid those particular Badges of Fraud and Surprize that came within the reach of the common Law, and there was a Fraud and Surprize in the present Case, tho' compassed in another Method, it was fitting the King should not be left without Relief in such a Case; if he was, he would be in a worse Condition than a Subject, who should avoid a Conveyance, nay a Fine, when obtained *mala fide*: and it was not fitting, that it should be left in the Power of the King's Officers by their Connivance to put his Majesty without Relief in the case of a Fraud and Surprize: and tho' there was no Precedent of any such Suit, yet all Precedents had a Beginning; and there
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was scarce any Precedent of such a Fraud and Surprize: And as the Remedy was proper, so in this Case there was sufficient Ground for a Decree, there being all the Badges of Fraud and Surprize imaginable. *First*, In the passing of the Grant, no Warrant to the Auditor to make out Particulars; no Warrant to the Surveyor to return an Estimate; no Bill with a Docquet signed by the Attorney; none of the usual Methods observed, but only a Warrant under the *Sign Manual* for passing the Grant in Question to the *Chancellor*, and Countersigned by him; which is to make a Warrant to himself, a thing never before heard of: And tho' a Patent may pass by immediate Warrant under the Privy Seal or Signet, yet this is in Effect no Warrant; being only under the *Sign Manual*, and no Seal to it, neither Privy Seal nor Signet: And then the hasty Proceeding is remarkable; this Warrant was signed but the 29th of *November*, and the Patent passed the Dutchy Seal the 31st of *November*, tho' it would take a Week's time to ingross it: And here the Petition, Proposal, the *Chancellor's* Report, and Warrant for the Grant, are all of the Hand-writing of *Wooley*, the Defendant *Vernon's* Man; and the Over-value in this Case was excessive, and the Consideration of the Defendant's Services and Sufferings were not to be regarded in the Case, the Patent being but in common Form, and no particular Notice taken of any Services or Sufferings; no Gratuity or Bounty being intended by the *King*, but it was a bare Purchase, and the Patent recites the Consideration, and that the Dependancies were great, and not fitting to be severed from the Crown; many Noblemen hold of this Honour: And the Precedent won't be of such dangerous Consequence as is pretended, for there must be a recent Prosecution in the Case of a Surprize; and here it was immediately; but an Acquiescence for any considerable time would have amounted to a Confirmation.

For the Defendant it was said, that there are two Questions, *first*, whether the Grant be avoidable by *English* Bill? *Secondly*, if avoidable, whether there be sufficient Ground to avoid the Patent in question?

First,

First, There is no Precedent of any such Suit ever brought into this Court, and it is *Littleton's Rule* *What never was, never ought to be*: And it is in itself repugnant, that Letters Patents being Matter of Record should be destroyed by *English Bill*; the *English* Side of the Court of *Chancery* being no Court of Record: And besides, the Law having set the Bounds what Matters shall be reckoned sufficient to avoid the King's Grant, and what not, and provided Remedies for such Cases, Equity ought not to go beyond the Law in this Case; and the rather, for that Relief in Equity ought to be mutual: Now if the Patent had been defective, or had not passed so much Land as was intended, yet this Court would never have relieved the Subject, as in *Doddington's Case*, (*Co. 2. Report*) where even in the Body of the Patent it appeared more Land was intended to have passed, yet there being a defective Description of it, Judgment was given for the second Patentee against the first, who was a Purchaser; and it was never heard that the Patentee came into this Court for Relief, tho' the Lawyers in my Lord *Cook's* Time were Men of great Learning and Abilities, and knew well how to advise their Clients, had they looked upon it as a Case proper for this Court to have intermeddled with: But in former Ages it was not thought that Letters Patents, being Matter of Record, could be altered or set aside by *English Bill*; but Acts of Resumption were then thought necessary; but this indeed is a more easy and expeditious Way, if it is to be admitted.

An Over-value was never yet thought a sufficient Ground to repeal a Patent in a *Scire fac'*; for Kings are presumed to be bountiful; and tho' all that a Subject can do is but what his Duty obliges him to, yet there are in this as strong Motives to incline his Majesty to be bountiful to the Defendant, as can be in any Case; for here the Defendant sold 400*l. per Ann.* and spent it in raising and maintaining a Regiment for his Majesty's Service, and was all along in Arms from the first setting up the Stand-

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ard at *Nottingham*, and was instrumental in his late Majesty's Escape from *Bristol*; suffered two Years Imprisonment in the *Tower*, presented his Majesty with 2000*l.* in his Exile, &c. and the Duke of *Ormond* proves, that the King designed him a Gratuity and Reward by the Grant in question. It is a Matter much in derogation of his Majesty's Grants, that they should be impeached on the Pretences in the Information, and of dangerous Consequence to all Patentees, especially if the succeeding King shall avoid his Predecessor's Grant on pretence of an Over-value; nor is that Mischief answered, in saying there must be a recent Prosecution; for the Law says *nullum tempus occurrit Regi*; and the Law has no more ascertained what shall be called a recent Prosecution, and what not, than it has what shall be reckoned an Over-value to avoid a Grant, and what not.

As to the Objection that this Patent did not pass in the ordinary and regular Method, and had not its due Progression, it was answered, that this must be taken to be well passed, and to be a good Grant at Law, otherwise there would be no need of an *English* Bill, but might be avoided by *Scire fac'*; for the Patent may be removed by a *Certiorari* into this Court, and then a *Scire facias* will lie: And the Methods of passing Grants in the *Dutchy* are various, and the Attorney of the *Dutchy* in his Deposition says, many Grants have passed by immediate Warrant under the Privy Seal or Signet; and they took it, that a Warrant under the Sign Manual was as valid as if it had been under the Signet or Privy Seal: And in this Case, Expedition and Secrecy, which are objected to us as an Evidence of a Surprise, were but necessary, it appearing in the Cause that the Defendant had a powerful Competitor, the Lord *Dartmouth* endeavouring to obtain a Grant of the things in question: And the Objection, that the Warrant for the Patent and other Papers were wrote by the Defendant's Servant, is of no great weight, it being common for Patentees to make use of their own Council; and Pa-

rents are many times drawn by them, and ingrossed by their Clerks; and if the proper Officers are answered their Fees, there is no great hurt in that; since that is not a Reason sufficient to avoid the Patent.

As to the Over-value, the Proof is various; there have been no less than three former Surveys, which in all other Cases have been the Foundation from which they have taken their Measures in the *Dutchy*; and if our Witnesses are to be credited, there is not really any considerable Over-value in the Case; and the Surveyor's Certificate here is *ex post facto*, and that not by the Surveyor of the *Dutchy*, who is the proper Officer in this Case: And had there been a Particular certified by the proper Officer precedent to the Grant, yet that should not now stand in Competition, or jostle with the Patent.

Lord Chief Baron Mountague said, he took it that the Allegations in the Information were fully proved, and that the King's Evidence was much stronger then the Defendant's; that the Proposal mentioned nothing of Services, but seemed to imply an adequate Consideration; and the Over-value being proved, he took that to be a false Suggestion: And the Over-value in some measure appeared from the Defendant's Tenaciousness. That the Warrant was of an unusual and unheard-of Nature; being directed to the *Chancellor* of the *Dutchy*, and Countersigned by himself; no Privy Seal or Signet to it; here were no Particulars from the *Auditor*, no Certificate from the Surveyor, and the Patent passed not gradually but *per saltum*; and he looked upon the Over-value to have been the occasion of the Secrecy, Huddle and Hastie that had been used in passing this Grant: And as to the Objection, that there was no Precedent of any such Suit brought into this Court; he said, this Court creates Precedents. It is not long since Bills to foreclose Redemptions were first brought in use, and the Court must find out new ways to obviate the Mischiefs of the Age, for *Crescit in Orbe dolus*; and he

he took it that no *Scire fac'* would lie in this Case, the Deceit not appearing in the Body of the Grant; and therefore thought his *Lordship* might justly decree a Re-conveyance, and that the Patent should be delivered up and cancelled: And he supposed Care would be taken that the Consideration should be restored.

Lord Chief Justice Jones said, The Pleadings in the Cause are very long, and the Proofs voluminous, he would not therefore (having but an old decayed Memory, and at this time wanting the use of Hands which might in some measure supply that Defect) take upon him to repeat all the Circumstances of the Case, but would in a few Words deliver his Opinion.

It is objected, that the Subject Matter of this Suit is not proper by an *English* Bill; that is not the proper Method, they say, for avoiding Letters Patents. I take it, that a *Scire fac'* will not lie in this Case, or if it would, yet the Deceit appears not in the Body of the Patent; and therefore a *Scire fac'* will not reach it. The Value is not mentioned in the Patent, and shall there be no way then where the King is deceived for his Majesty to be relieved? That would be to put him in a worse Condition than a Subject. But there is no Precedent, they say; he was sorry that Colonel *Vernon*, an honest Gentleman, and of known Loyalty, should be the Occasion of making a Precedent of this nature; but there was a time when all Precedents began. Had the Patent been intended a Gift or Gratuity only to the Defendant *Vernon* for his Services, there no Fraud or Surprize would have been collected from the Over-value; but there being Money to be paid for the Grant, and that being the Consideration which was regarded, as well as the Defendant's Services and Sufferings, he therefore thought the excessive Over-value in this Case argued a plain Surprize, if not a Fraud. But it is objected, What shall be said to be such an Over-value as will avoid a Patent, and what not? My Brother *Pemberton*, in
arguing

arguing for the Defendant, admitted that an excessive and outrageous Value might do it; and the Court is to judge what is excessive and outrageous, and what not. He thought the Plaintiff's Proofs as to the Values were much stronger and more full and exact than the Defendant's; but yet had there been no unfair Practice or Artifice in the Case, he should have moved my *Lord Chancellor* that an Issue at Law might have been directed, for ascertaining the Value; but as this Case was a Patent huddled up in haste by an unusual sort of Warrant, all Offices past by, no Money at the time paid, but only a Note given to the *Chancellor* of the *Dutchy*, who was not the proper Officer to receive the Monies; and here before the Grant was perfected, (that is to say, before Livery) there was a kind of a Prohibition, and Mr. *Curson* was desired not to receive the Monies. Therefore upon the whole Matter he thought his Lordship might very well decree the Patent to be delivered up and cancelled, and order a Reconveyance to be made:

Lord Chancellor thanked their Lordships for their Assistance in this Cause, which was a Cause of very great Consequence, and was glad to find their Lordships concurred so entirely in Opinion with him; for besides the Apprehension he had of his own Inability, he had formerly heard this Matter at the Council Board, and knew many things of his own Knowledge that might have had some Influence on his Judgment; but now he was fully convinced that he ought to decree the Patent to be delivered up. That Colonel *Vernon* has been very Loyal, and that his Services and Sufferings for the Crown have been considerable, must be admitted; it is proved by Persons of great Quality, that were concerned with him; but after all that is but every Subject's Duty; and by the way he said, he must take notice that Colonel *Vernon* had before this time tasted of the King's Bounty both in *England* and in *Ireland*; that this Patent was not designed or intended to be a Bounty or Reward to Colonel *Vernon*, but was intended

a Purchase, and nothing else: for here, as soon as ever the late King was informed of the Over-value, he gave Directions for setting aside this Patent, which answer'd the Objection of a succeeding King's avoiding his Predecessor's Grants, for here the Prosecution was begun in the time of his late Majesty. There is nothing of Services suggested in the Petition, nor any thing of it mentioned in the Patent, and the Words *ex mero motu* are only words of Course, &c.

The first Question then is, whether this Court upon an *English* Bill may in any Case decree Letters Patents to be delivered up and cancelled: and he was clear of Opinion, that had the Patent passed ever so regularly, that yet this Court might have decreed it to be delivered up. Fraudulent Contracts and Bargains are properly relieveable here; the Precedents are common. In the Case of *Coleby* and *Smith*, a Fine, Conveyance, Release, Articles, and several other Deeds, made at a considerable distance of time one after another, were all set aside. But it is asked, how can a matter of Record be vacated by *English* Bill? Does not this Court every Day decree Satisfaction to be acknowledged on Judgments and the like? And he said, that the Patent in question was not matter of Record, for the Estate passed by Livery, and therefore he thought a *Scire fac'* would not lie in this Case, because it is no Record; for had the Patent been removed by a *Scire fac'* into this Court, that would not have made the Patent a Record, which was no Record before: but in Case a *Scire fac'* would have lain, he thought there was sufficient ground to avoid these Letters Patents upon a *Scire fac'*, because there was no sufficient Warrant for the passing of the Grant; there being neither Privy Seal, nor Signet to it; and to say no worse, the *Chancellor* of the *Dutchy* was at least surprized in the passing of this Grant, and had gone beyond all manner of Method. A Report ought to have come back to the Secretary's Office, from which the Warrant was made; here the Warrant for passing the Grant is counter-

counterfigned by the *Chancellor* himself, who is to pass it; the Report and the Warrant for the Grant are both wrote by *Vernon's* Man; and here is a Warrant to *Tench* to make out Particulars on the same Day that the Report bears date; and the Warrant is but the 19th of *November* and the Patent is ingrossed and passed the 21st of *November*; in so short a time, that it was not possible to be done after the Warrant passed; but all things were prepared and in a readiness for a Surprise; and here before Livery, and before the Money came to *Curson's* Hands, there is a Countermand and a Caveat entered; and tho' from the Lord *Dartmouth*, yet that is not material: and the King, had he known how the matter stood (but that was kept secret) might have countermanded the Livery; and then the Patent had been invalid. And here the *Chancellor* is Secretary, is Treasurer, counterfigns a Warrant to himself, is every thing: What Authority had he to receive the Money? they might as well have paid it to any body they had met; and before it came to *Curson's* Hands, he is told the King was displeased with the Grant, and desired to forbear receiving of it: so that in truth here is no Money paid at all. And then the Over-value is excessive in this Case: It is fully proved, (and he said, he knew it) that Mr. *Harbord* offered to give as much as the Particular comes to, and so did other Gentlemen of the Country; and any one that knows Mr. *Harbord* will easily believe, that he would not knowingly buy an ill Bargain, or sacrifice so many thousand Pounds out of any Peake to Colonel *Vernon*: and the greatness of Extent and Dependancies must be made an Ingredient in this Case. He said, he could with the Crown had not parted with so many Flowers, as it hath already done, and then he was perswaded there would not have been so many Rebellions as there have been: and tho' Colonel *Vernon* was an honest Gentleman and of good Quality, the Honour of *Tutbury* is of that vast Extent, and so many Noblemen hold of it, that it is not fitting for a Person of his Degree; and therefore decreed the Patent to be delivered up and cancelled, and that Colonel *Vernon* should procure his

his Trustees to reconvey; and said, Care would be taken that the Money should be repaid: But that Matter would be most proper upon a Petition to the King.

But *Note*, here was no Direction for conveying back of *Sheirness* to *Vernon*, nor any Satisfaction to be made for it. And afterwards by a Bill exhibited by *Brown* against *Vernon* and *Curson* for the 7000*l.* *Vernon*, who refused to give any Obedience to the Decree, dying before he Answered that Bill, *Brown* set up an Administrator to him, who put in an Answer, and *Brown* obtained a Decree against *Curson* for the 7000*l.*

Dancer versus Evett.

Cafe 364.

March, 1685.

Lord Chancellor.

Copyholder in Fee takes an Infranchisement of his Copyhold in the Name of a Trustee, and devises the Land to his younger Son, who sells to *A.* The Heir at Law of the Copyholder recovers in Ejectment, and *A.* brings his Bill, and is Decreed to hold and enjoy against the Heir.

THE Cafe upon a Bill of Review was this. A Copyholder in Fee agreed with the Lord to Infranchise his Copyhold, and took the Conveyance from the Lord in the Name of a Trustee, and then devised the same Lands to a younger Son, from whom the now Defendant purchased them. The now Plaintiff, who was Heir at Law of the Copyholder, recovered the Lands in Ejectment (as he might do upon his Ancestor's Admittance) and thereupon the now Defendant brought his Bill against the Heir to be relieved in Equity, and insisted that the Estate purchased of the Lord was purely an Estate in Equity according to the Case of *Smith* and *Murrin*, reported amongst the Lord *Coke's* Copyhold Cases (*fo. 24. b.*) and that the disposition of the Fee to the Purchaser was a disposition of the whole Estate that the Copyholder had either in Law or Equity: and the Lord *Chancellor Nottingham*, who heard the Cause, was of that Opinion, and Decreed that the Purchaser should hold and enjoy against the Heir of the Copyholder, who now brought his Bill of Review to reverse the Decree, and insisted that his Ancestor did not alien the Copyhold.

The Defendant, who was Plaintiff in the Original Cause, pleaded the Decree, and insisted by way of De-

murrer, there was no Error in it; and the *Lord Chancellor* was of that Opinion, and allowed the Demurrer.

Parker versus Turner.

Case 364.

March, 1685.

Lord Chancellor

A Person being Tenant in Tail Male of a Copyhold Estate, Remainder to himself in Fee, purchased the Freehold of the Copyhold from the Lord, and then for a full Value bargains and sells the whole Estate, which was quietly enjoyed under the Purchase 30 Years. The Tenant to the Purchaser being a Woman, and the Copyholder being dead, married his Son, who being thus got into Possession set up his Title as Issue in Tail: the Plaintiff, who claimed under the Purchaser, brought an Ejectment, and a special Verdict was found at Law; but before that was argued he brought his Bill here for a Decree to hold against the Issue in Tail, and the Defendant pleaded his Title.

A. B. Tenant in Tail of a Copyhold, Remainder to himself in Fee, purchases the Freehold of the Lord, and then sells to J. S. and dies; and after 30 years Possession, the Son of A. B. sets up a Title as Issue in Tail. Purchaser decreed to hold against the Issue in Tail.

2 Chan. 174.

Post Case 434.

The *Lord Chancellor* declared, he was of Opinion that the Purchaser of the Freehold should attract the other Estate, which was but at Will; however took time to consider of it, and afterwards did Decree it so accordingly, and that the Purchaser should enjoy against the Issue in Tail.

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Termino Paschæ,

2 Jacobi II. 1686.

IN CURIA CANCELLARIÆ.

Case 365.

26 Aprilis.

In Court,
Lord Chancellor.

A in 1657
conveys to *B*,
subject to Re-
demption on
Payment of
380*l.* in 1688,
and Possession
is immediately
delivered.

Redemption
decreed and an
Account of
Profits, before
the Day of
Payment in
the Proviso.

Tallbott versus Braddell.

THOSE under whom the Plaintiff claims, in the year 1657 conveyed the Estate in question, being Part in Possession and other Part leased out for Lives unto the Defendant and her Heirs, and this was in consideration of 320*l.* paid, and a Reservation of 5*s.* per *Ann.* Possession is delivered immediately, but there is a Proviso in the Deed that on Payment of 380*l.* in the Year 1688, the Estate should be redeemed or reconveyed. It appeared in the Cause that the Estate in Possession at the time of the Conveyance was but 15*l.* per *Ann.* that the 5*s.* Rent had been always paid: but two old Lives happening to die within some few Years after the Conveyance, the Estate became 45*l.* per *Ann.* and the Plaintiff's Bill was now to redeem.

This Cause had been heard by the *Lord Keeper North*, and a Redemption decreed with an Account of Profits, and the Master had reported the Defendant overpaid; and the Cause came now to be reheard.

It

It was insisted for the Plaintiff, that this was a special Bargain and Agreement of the Parties, that ought to be binding; and that the Estate was not redeemable till 88; and that then there ought to be no Account of Profits, but 380*l.* ought to be paid for the Redemption.

First, That the *lien* in a Mortgage ought to be equal; where one Side cannot foreclose, the other ought not to redeem: and in this Case the Plaintiff could not have foreclosed the Defendant till 88.

Secondly, That an Account of Profits was not reasonable in this Case; *first*, because there was a Contingency in the Case; as the Lives happened to die soon, so they might have lived long, and then the Defendant had lost good part of his Interest; and *secondly*, it is usual and common in *Welch* Mortgages to deliver the Possession immediately, and to agree to set the Profits against the Interest; and such Agreements have always been allowed good in this Court.

For the Defendant it was insisted, that this Court had always favoured Redemptions; and if the Court should suffer Redemptions to be fettered by such Clauses, Scriveners would be inserting them in every Mortgage, and by that means worm young Heirs out of their Estates: and it was said, that the Rule where one Side can't redeem, the other can't foreclose, does not hold in all Cases: for if I lend 100*l.* upon a Mortgage with a Proviso to redeem on Payment of 112*l.* at the end of 2 Years, there one Side can't foreclose till the end of 2 Years; but if the Mortgagor comes at the end of the first Year, and offers to pay the 112*l.* he shall be admitted to the Redemption.

The Court inclined that the Plaintiff should redeem, but proposed, that whereas the Master had reported the Defendant to be 60*l.* overpaid, and the Defendant had since that received two Years Profits, the Plaintiff should wave

the Benefit of the Account, and the Defendant forthwith deliver Possession; and gave the Defendant a Week's time to consider of this Proposition.

Cafe 366.

Oglander versus Baston.

27 Aprilis.

In Court,
Lord Chancellor.

A Sum of Money awarded to the Husband, which he is intitled to in right of his Wife, will go to his Executor, and will not survive to the Wife.

THE Plaintiff being intitled to the Surplus of the personal Estate of I. S. as Residuary Legatee, and a Difference arising between the Plaintiff's Husband and the Executor touching the *quantum* of this *residuum*, it was referred to Arbitration, and an Award is made that the Executor of I. S. should pay 1500*l.* to the Plaintiff's Husband; but before any thing further was done, the Husband dies, and this Bill was now brought by the Wife against the Executor of her Husband, and also against the Executor of I. S. and the sole Question was, who had the right to this 1500*l.* whether the Executor of the Husband, or whether it should survive to the Wife.

Lord Chancellor. The Award is a sort of Judgment, and the Arbitrator having awarded that the 1500*l.* should be paid to the Husband, That has changed the Property, and vested it in the Husband.

The Cafe of *Norden* and *Lewet* was cited, where the Husband had a Term in Right of his Wife, and only took a Covenant for further Assurance; and it was adjudged, that altered the Property. On the other Side it was said, that if the Husband grants a Rent-charge out of a Lease, which he has in the Right of his Wife, that does not change the Property: but if the Husband makes a Demise of the Term it self, tho' but for a fortnight, that will alter the Property. *Per Cur.* If there be a Bond-debt due to the Wife, the Husband may sue alone without joining his Wife; but in case the Wife was joined in the Action, and Judgment is recovered, the Judgment will survive to the Wife; but not being joined, the Interest

A Man may sue alone without his Wife for a Debt due to her by Bond. But if he joins the Wife in the Action and recovers Judgment and dies, the Judgment will survive to her.

does vest by the Judgment in the Husband, and will go to his Executor.

Jauncy versus Sealey.

THE Plaintiff, as Administrator to J. S. who died at Naples, brought his Bill to have a Discovery of the Intestate's personal Estate. The Defendant pleaded, that the supposed Intestate had made a nuncupative Will in the Presence of nine or more credible Witnesses, and thereby made the Defendant Executor, and that he (the Defendant) had proved the Will according to the Custom of the Country where the Testator died; and denied he had left any Estate, but what was at Naples.

The Court allowed the Plea, and said the Testator having left no Estate in England, it was not necessary that the Will should be proved here; no more, than if a Man died and left an Estate in Scotland.

Fowke versus Hunt.

A Citizen of London dies leaving a Widow, and no Children, but has several Grand-Children living at the time of his Death; and the Question was whether they were within the Custom of the City of London or not. The Lord Chancellor took time to consider of the Case; and having consulted the Recorder and several of the Aldermen, this Day delivered his Opinion, that Grand-Children were not within the Custom of the City of London.

Clobery versus Symonds.

THE Plaintiff's Bill was to redeem Lands, which in the First Year of King Charles the First were extended upon a Judgment for 400 l. the Plaintiff deriving his Title

Case 367.

29 Aprilis.

In Court,

Lord Chancellor.

A. died beyond Sea and made a nuncupative Will. B. took Administration here, and brought his Bill for a discovery of the supposed Intestate's Personal Estate. The Defendant pleaded the Will and that he was Executor, and that A. left no Assets, but what were beyond Sea.

Plea allowed.

A Will of a Personal Estate which lies in a Foreign Country may be prov'd there, and need not be prov'd here.

Case 368.

Grand-Children not intitled to a Customary share of a Freeman's Personal Estate by the Custom of London.

Case 369.

Eodem die.

Lord Chancellor.

Conuizee of a Judgment extends the Lands of the Conuizor upon an Elegit.

Conuzor grants over the Rever- sion; the Gran- tee may bring a Bill to redeem the Conuzee, tho' at a great distance of time and tho' a former Bill for the same Purpose was dismissed.

Title under one, who Purchased these Lands from the Conuzor of this Judgment without notice. The Defen- dant claimed part of the Lands by Assignment under the Conuzee of the Judgment, and pleaded that so long ago as in the Year *J. S.* under whom the Plaintiff claims, brought his Bill in this Court to redeem: that the Cause was heard, and an Account directed to be taken by one of the Masters of this Court, and it was ordered that the Plaintiff should within 6 Months after the Report made pay the Money reported due, or in default thereof the Bill was to stand absolutely dismissed. That the Master made his report accordingly, and that *J. S.* did not pay the Money reported due within the time limited by the decretal Order; and thereupon the Bill was dismissed: and that *J. S.* lived above 20 years afterwards, and never sought any Redemption; and averred that the Profits of the Lands were not sufficient to pay the Interest of the Mony re- ported due; and that since this Dismission he had purcha- sed part of the Land for a valuable Consideration, and demanded the Judgment of the Court, whether after this length of Time and Proceedings aforesaid the Plaintiff should be admitted to a Redemption.

The Court over-ruled the Plea, because under the Extent the Defendant has at Law an Interest only *quousque* he is satisfied; and the Dismission here will not give him a greater Estate; and it would be absurd to deny a Redemp- tion; for the Interest under the Extent was but a Châttel Interest, and the consequence of denying a Redemption would be, that Lands of Inheritance should not descend; but to the World's end go in a course of Administration.

Cafe 370.

Eodem die.

In Court,
Lord Chancellor.
Plaintiff having
recovered Judg-
ment at Law
for 1400 l. a-

Smithier versus Lewis.

THE Plaintiff having obtained a Judgment against the Defendant on a Bond of 1400 l. Penalty for pay- ment of 700 l. and Interest, brought his Bill, and setting forth this

this Judgment, complained, that the Defendant to defraud him of the benefit of it, had assigned his Estate to Trustees, that he had lent 1200 *l.* to *Rowe* and *Green*, who were since become Bankrupts, in the name of one *Elton*, but that it was in Trust for the Defendant *Lewis*, and therefore prayed a discovery of this Matter, and that the Plaintiff might come in under the Statute of Bankruptcy for this 1200 *l.* Debt, and that the Commissioners might not make any Distribution, till this Matter was determined.

gaint *J. S.* brings a Bill charging that *J. S.* had convey'd his Estate to Trustees and had lent 1000 *l.* to *A.* in *B.*'s Name, and praying that this might be lyable to Plaintiff's Debt.

Defendant demurs, for that he was not bound to discover his Personal Estate, and Demurrer over-ruled.

See the next Case.

The Defendant demurred, for that he in his Life-time was not bound to discover his Personal Estate; and for that this Bill was in the nature of a Foreign Attachment, which the Practice of this Court did not admit or countenance.

Per Cur'. Over-rule the Demurrer.

Angell versus Draper.

THE Bill was, that the Plaintiff had obtained Judgment against *J. S.* for 100 *l.* and that the Defendant upon pretence of a Debt due to himself, and to prevent the Plaintiff's having the benefit of his Judgment, had got Goods of *J. S.* of great Value into his hands, sufficient to satisfy his Debt with a great Over-plus; and pray'd an Account and Discovery of these Goods.

Case 371.
Eodem die.

In Court,
Lord Chancellor.
A. obtains Judgment against *B.* and brings a Bill against *C.* for an Account and Discovery of Goods of *B.* which *C.* had got into his Hands.

Defendant demurred, because the Plaintiff had not alledged he had taken out Execution.

Demurrer allowed.
See the foregoing Case.

The Defendant demurred, because the Plaintiff had not alledged that he had sued out Execution, and had actually taken out a *Fieri fac'*; for until he had so done, the Goods were not bound by the Judgment, nor the Plaintiff intitled to a Discovery or Account thereof. *Per Cur'.* Allow the Demurrer: the Plaintiff ought actually to have sued out Execution before he had brought his Bill.

Case 372.

30 Aprilis.

In Court,
 Lord Chancellor.
 An Attachment
 sued out in the
 time of King
Charles the
Second, and
 executed three
 Days after the
 King's Demise,
 but before No-
 tice of his
 Death, adjudg-
 ed to be well
 executed, and
 the Proceedings
 thereon regular.

Burch versus Maypowder.

THE Question upon the Master's special Report was, whether an Attachment that was sued out in the time of the late *King*, and was Executed at *Exeter* 3 Days after the *King's* Demise, but before any Notice of the *King's* Demise, was well executed or not.

The Objection taken to it was, that tho' the Execution of the Attachment before Notice of the *King's* Demise was good, and would excuse the Officer that did it; yet the Return of the *Cepi Corpus*, which was made after notice of the *King's* Demise, was nought; and the Plaintiff having upon the *Cepi Corpus* returned got a Messenger and Proceeded for the Contempt, *that* was irregular.

But the Court, on reading the Case of *Crew* and *Vernon*, in *Cro. Car'* 97, and a Precedent in the Lord Keeper *North's* time, betwixt *Vaughan* and *Bampfild*, was of Opinion, that the Attachment was well executed and also well returned, and that the Proceeding upon it since was good.

Case 373.

4 Maij.

In Court.

Action of Debt
 brought against
 an Heir upon
 the Bond of his
 Ancestor, who
 pleads a false
 Plea and the
 Plaintiff has
 Verdict; the
 Defendant dyes
 before the Day
 in *Bank*, and
 devises his
 Lands to *J. S.*,
 the Oblige
 brings a Bill a-
 gainst the De-
 visee to be paid
 his Debt. Bill
 dismissed.

Holley versus Weedon.

ONE *Thomas Castle* became Bound to the Plaintiff for Payment of 100*l.* and Interest, and dies; and some Land, of which he was seized in Fee, descended to *Jane* his Daughter and Heir. *Jane* died, and the Land descended to *Robert*, her Uncle and Heir. The Plaintiff sues out an *Original* against *Robert*, who pleaded a false Plea, and the Plaintiff had a Verdict at Law for Recovery of his Debt: but *Robert* died before the Day in *Bank*, having devised his Lands to the Defendant his Son.

The End of this Bill was to affect the Lands in the hands of the Defendant with this Debt recovered at Law,
 but

but rendered fruitless by the hand of God: And the Case of *Parker* and *Dee* was cited as a Precedent near this Case.

Lord Chancellor. Dismiss the Bill; there is no colour of Equity in the Case, unless you'll have it that *Robert* died maliciously before the Day in *Bank*, on purpose to defeat the Plaintiff of his Debt.

See St. 17 Car. 2. cap. 18. § 1 Jac. 2. cap. 17. Also see St. 3 & 4 Wm. & Mar. cap. 14.

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Term. S. Trinitatis,

2 Jacobi II. 1686.

IN CURIA CANCELLARIÆ.

Case 374. *Com' Winchelsea versus Wentworth. & al'.*

16 Junij.

In Court.

Post Case 405.

Lands are limited to the second Son in Fee, provided that if the eldest Son die without Issue the second Son should within six Months after such Death of the eldest Son pay 1500*l.* to the Sister; or in default thereof, the Lands should go to the Sister and her Heirs. The eldest Son dies without Issue. The Sister dies within the six Months; her Heir, and not her Executor, shall have the Benefit of this Devise over.

THE Lands in Question were limited to *John* the second Son; subject to a Proviso that if his elder Brother should die without Issue, *John* should pay the Lady *Katherine* 1500*l.* within six Months after the Death of the elder Brother; or in default thereof, that the Land should go to the Lady *Katherine* and her Heirs. The elder Brother dies without Issue, and within three Months afterwards, being before the time for Payment of the 1500*l.* the Lady *Katherine* died, and *John* refused to pay the 1500*l.*

The principal Question was between the Heir and Executor of the Lady *Katherine*; viz. Whether this should be taken as a real Estate and go to the Heir of the Lady *Katherine*, or be looked on as a personal Estate, and only a Security for Money, she dying before the time of Payment, and go to her Executor.

The Lord Chancellor directed a Case should be stated by a Master for the Judgment of the Court.

In arguing of this Case, were cited the Case of *Pitcarne* and-----, and *Wallis* and *Grimes*, where the Court had

re-

relieved in like Cases, against the Limitation over, on Payment of the Mony, tho' after the Day.

But the *Lord Chancellor* declared his Opinion, That the Court ought not to relieve in such Cases, for that is to destroy the known and common Difference between a Limitation and Condition.

Earl of Winchelsea versus Norcliff & al'.

Cafe 375.

Eodem die.

In Court.

Post Cafe 410.

A Guardian to an Infant having a considerable Sum of Money in his Hands, that was raised out of the Infant's Estate, lays out 2500*l.* in a Purchase taken in the Name of *I. S.* for the Benefit of the Infant, if, when he came of Age, he should agree thereto, and allow the Trustees that Money upon Account. The Infant dies under Age.

The Question was whether the Heir of the Infant should have this Estate, or whether it should be looked on as a Security for 2500*l.* and go to the Executors or Administrators of the Infant? As Precedents for the Heir were cited the Cases of *Palmer* and *Allicot*, and *Dennis* and *Badd*, where a Guardian buys in a Mortgage on the Infant's Estate, and takes an Assignment of it in the Names of Trustees.

The Court inclined to the Heir, but referred this to be stated as a Case by the Master. And in this Case the Court held, that where a Person intitled to a Share of an Intestate's Estate dies before Distribution, and within the Year, there was an Interest vested, and that his Share should go to his Executor or Administrator.

In this Case also the Court was of Opinion, that where there is a Brother of the whole Blood to the Intestate, and

a Sister of the half Blood, the Sister should have but half a Share.

But *note*, the Judgment in the Cases of *Smith* and *Tracy*, and *Stapleton* and *Sherrard*, and the constant Practice of the Court, has been otherwise.

Note, It has been since settled in the Case of *Crooke* and *Watts*, upon an Appeal to the House of Lords, that the half Blood should have a whole Share, *viz.* equal with those of the whole Blood.

Case 376.

30 Junij.

In Court.

Lands in Mortgage devised to *A* for life, remainder to *B* in Fee. *A* takes an Assignment of this Mortgage in a Trustee's name. *B* may compel *A* to contribute a third of the Mortgage in respect of his Estate for Life. Otherwise if the Tenant for Life is dead, and a Bill is brought against his Executor.

Clyat versus *Batteson*.

LANDS in Mortgage are devised to *A* for Life, Remainder to *B* and his Heirs. *A* enters and buys in the Mortgage, taking an Assignment in Trustees Names, and dies. *B* the Remainder-Man now prefers his Bill against the Defendant, the Representative of *A*, to redeem the Mortgage; and his Council insisted, that he ought to pay but two thirds of what was due on the Mortgage, and the other third ought to be allowed by the Defendant, by reason that the Tenant for Life enjoyed the Profits during his Life.

Per Cur'. Had you come to redeem in the Life-time of the Tenant for Life, then he should have allowed a Proportion of the Money with respect to the Value of the respective Estates of the Tenant for Life and Remainder-Man; but he being now dead, and having enjoyed the Estate but one Year only, the Defendant must make an Allowance only for the time that *A* enjoyed the Estate.

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Term. S. Michaelis,

2 Jacobi II. 1686.

IN CURIA CANCELLARIÆ.

The Earl of *Kildare* versus Sir *Morrice*
Eustace & al.

THE Plaintiff's Bill was to be relieved touching the Trust of certain Lands in *Ireland*. The Defendants had appeared and answered the Bill, and had not any way objected to the Jurisdiction of this Court: But the Cause coming now to be heard, the *Lord Chancellor* objected, this Court could not hold Plea of Lands in *Ireland*.

Case 377.

8 Novembris.

In Court,
Lord Chancellor.

2 Ch. Rep. 188.

Post Case 398.

399. 404. 411.

Bill lyes here
to be relieved
touching a
Trust of Lands
in *Ireland*, De-
fendant being
in *England*.

For the Plaintiff it was urged, that he was proper for Relief in this Court by reason that both Plaintiff and Defendant were here in *England*, and that a Court of Equity does only *agere in personam*; its Proceedings are to reform the Conscience of the Party, and if at any time a Court of Equity may be said to *agere in rem*, it is only in the Case of *Sequestration*, which is for the Contempt of the Party; and that therefore the Defendant being served with a *Subpœna* here, and living in *England*, this Court had proper Jurisdiction of the Cause, tho' the Land lyes in *Ireland*; and the rather, for that it was never yet pretended

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*Ante Cafe 70.
Ante fo. 239.*

ded that there was any local Action in Equity: and they instanced for Precedents the late Cafes of the Lord *Arglasse* and *Muschamp*, and Lord *Arglasse* and *Pit*, and *Archer's* Cafe, and insisted that otherwise there would be a failure of Justice, for the Defendant living here could not be served with Process issuing out of the *Chancery* in *Ireland*.

But the *Lord Chancellor* over-ruled the Plaintiff's Council, and said as to the Cafes of the Lord *Arglasse*, the fraudulent Contracts were made here in *England*; and as to the present Cafe there would be no failure of Justice, for they might have a *Subpœna* out of this Court returnable in the *Chancery* of *Ireland*; as in his own Experience, in Cafes between Master and Prentice in the City of *London*, he had known *Subpœna's* to have Issued out of this Court returnable in the *Mayor's* Court in *London* for Persons that lived out of the Jurisdiction; and therefore pronounced the Rule for the dismissing the Bill: but at the Importunity of the Plaintiff's Council gave them a Week's time to search for Precedents.

Cafe 380.

Elliot versus Hele.

10 Novembris.

Lord Chancellor.

2 Ch. Rep. 29.

Tenant in Tayl with power to make a Jointure, in consideration of Marriage, articles to make a Jointure, and dies without Issue and without making the Jointure: the Wife dies; and her Executrix brings a Bill for an Account of the Profits of the Lands Articled to be settled.

Bill dismissed.

TENANT in Tayl with power to make a Jointure of Lands in the Counties of *A*, *B*, and *C*, remainder in Tayl to *J. S.* Marries and receives 3000*l.* Portion with his Wife, and by Articles before his Marriage covenants to settle a Jointure, but dies before any Settlement was made; the Wife dies, and her Executrix brings the Bill to have an Account of the Profits of the Lands, which by the Articles were covenanted to be settled in Jointure, against the Remainder-Man, who had upon his Marriage settled those Lands upon his Wife and her Issue: but with Notice of the Power in the first Tenant in Tayl to make a Jointure.

The *Lord Chancellor* dismissed the Bill, there being no Equity for the Administratrix of the first Jointress against the

the second and her Issue, who was equally a Purchasor with the first: And this Power being a general Power to make a Jointure, and not said of what Lands in particular, was not such a *Lien* upon the Lands as should affect a Purchasor, tho' the Power had been afterwards executed; much less where it was not executed at all: for as a Man by such general Power might make a Jointure of 500*l.* *per Ann.* so he might make a Jointure of 50*l.* or 5*l.* *per Ann.* And said there was a great difference between a defective Execution of a Power, and where the Power was not executed at all.

But then for the Plaintiff it was insisted, that there were some Fee-simple Lands, which were devised over, and those Lands in the hands of a voluntary Devisee were as much bound by those Articles, as if they had remained in the hands of the Heir; as where a Trustee makes a voluntary Conveyance, the Feoffee, according to the Resolution in *Chudleigh's Case* before the Statute of Uses, stood seized to the same Uses; and the Law is the same of a Trust, which is not executed, by the Statute at this Day.

Marsden versus Panshall.

Cafe 381.

11 Novembris.

Lord Chancellor.

THE Plaintiff was a Cloathier in *Yorkshire*, and intrusted one *Bumpas* to sell his Cloaths here in *London*. *Bumpas* after he received the Cloaths from the Plaintiff Pawns them to the Defendant, who was a Pawn-Broker in Town. The Plaintiff's Bill was to discover whether those Cloaths came to the Hands of the Defendant; who by Answer confessed, that some Cloaths were Pawned to him by *Bumpas*, but did not admit that they were the Plaintiff's Cloaths, whereby to enable him to bring an Action at Law.

A Country Cloathier sends Cloaths to his London Factor to sell. Factor Pawns them. Pawnee by Answer admits Factor pawned some Cloaths, but knows not whether they were the Plaintiff's.

Ordered, that the Cloathier in the Presence of 2 or more may have a view of them.

Serjeant *Maynard* this Day moved for the Plaintiff, that the Defendant might be ordered to let the Plaintiff, with two

or

or more Persons present have a fight of the Cloaths pawned by *Bumpas*; which was ordered accordingly; the Meaning of which was, and so it was taken by the Court, that the Plaintiff should thereby be enabled to bring an Action at Law.

Hunt versus Matthews.

Cafe 382.

20 Novembris.

*Master of the
Rolls in Court.*

A Widow before her Marriage with her second Husband assigns over the greatest part of her Estate to Trustees in trust for her Children by her former Husband. Tho' this was without the Consent of her second Husband, yet it being to provide for her Children by former Husband, 'tis good.

And Husband suppressing the Deed decreed to pay 800*l.* being the Sum proved to be mentioned in the Deed to be the value of the Goods.

THE Cafe was: A Widow before she married the Defendant, her second Husband, assigned over the greatest Part of her Estate, to the Value of 800*l.* to Trustees, as a Provision for her Children by her first Husband. The Defendant after his Marriage having got this Deed into his Possession suppressed it.

Upon the Hearing it was insisted for the Defendant, that this Deed made by the Widow, a little before her Marriage with the Defendant, was fraudulent, and done with a Design to cheat her Husband, and ought not therefore to be countenanced in Equity: and cited the Cafe of *Sir Phillip Howard and Baker*, where an Assignment made by the Widow before her marrying a second Husband was by Decree set aside.

But the Court thought, that a Widow might with a good Conscience, before she put her self under the Power of a second Husband, provide for the Children she had by the first; and the Deed being suppressed by the Defendant, by which the Particulars and Value of the Estate might appear, Decreed him to pay the 800*l.* without directing any Account.

Cafe 383.

Eodem die.

*Master of the
Rolls in Court.*

Husband covenants with his intended Wife

Furfor versus Penton.

THE Cafe was: A Man before Marriage covenants with his intended Wife, that she should have
Power

Power to dispose of 300*l.* of her Estate, notwithstanding the Intermarriage. The Husband now brings his Bill against the Defendant, in whose Hands the 300*l.* was, setting forth that if there was any such Agreement with his Wife, the same was discharged by the Intermarriage.

that she should have Power to dispose of 300*l.* of her Estate. Whether this Covenant is discharged by the Marriage?

For the Defendant it was insisted, that he was concerned only as Trustee; but offered it to the Court, that tho' the Covenant was improvidently taken in the Name of the Wife, whereas it ought to have been in the Name of Trustees, and tho' it should be admitted that the Marriage in strictness of Law had discharged the Covenant, yet a Court of Equity would never suffer a Trust to be so defeated; and the Court inclined to dismiss the Bill: But then the Plaintiff's Council alledging, that the Wife was consenting that the Money should be paid to the Husband, the Court adjourned the Cause till next Term, when the Plaintiff might bring his Wife into Court to be examined.

In the arguing of this Case, the Case of *Smith & Un' versus, Stafford* in *Hob. fo. 216*, was cited, where according to the Book a Promise by the Husband to the Wife before Marriage to leave her 500*l.* at his Death was discharged by the Intermarriage: But note, the Case of *Clarke and Thompson* (*Cr. Jac' fol. 571*) is directly contrary; and there the Case of *Smith and Stafford* is cited, and *three Judges* were of Opinion, that the Promise was not discharged by the Intermarriage; and only my Lord *Hobert* of the contrary Opinion: But neither of those Cases come up to this Case; for here it is that the Wife, tho' married, may dispose of 300*l.* There it is, that the Husband at his Death would leave his Wife worth 500*l.* and the reason of the Case in *Cr. Jac'* is, that it was not a Duty during the Coverture.

Case 384.

15 Novembris.

In Court
Lord Chancellor.If the Equity
of Redemption
of a Mortgage
for Years is
Assets to pay
Bond-Debts.See the next
Case.*Cole versus Warden.*

THE Plaintiff having a subsequent Mortgage and having also bought in the Title of the Heir at Law to one *Le Wright*, brought his Bill against the Defendant and one *Richardson* and others, and *Richardson* by Answer set forth, that he had a prior Mortgage from *Le Wright*, and also Monies due to him by Bond, and on Payment should be ready to reconvey.

For the Defendant it was insisted, that as against the Heir, the Mortgage being but a Mortgage for Years, the Reversion, which attracts the Redemption, was Assets at Law, and for that Reason the Equity of Redemption was adjudged Assets in this Court in the Case of *Davie and Dabinnett*, which was first heard at the *Rolls*, and settled upon an Appeal to the *Lord Chancellor*; but it was admitted there was a Difference between a Mortgage in Fee, and a Mortgage for Years; for in the Case of *Bennett and Box*, which was resolved with the Advice of Judges, they would not allow, that the Equity of Redemption of a Mortgage in Fee should be Assets in Equity to pay a Bond Creditor: but in this Case the Plaintiff has not only the Title of the Heir at Law, but also subsequent Mortgages, which his Council alledged were to the Value of the Estate.

The *Lord Chancellor* directed the Master should certify that Matter specially, and when he saw the Value of the Estate, he would decree according as the Nature of the Case required; his present Opinion being, that if there was a Surplus beyond the Mortgages, it should be Assets to answer Bond-Debts.

Pluck-

Plucknet versus Kirk.

Cafe 385.

Eodem die.

In Court.

AMONGST other Matters in this Cafe, the Point chiefly disputed was, whether the Equity of Redemption of a Mortgage in Fee, since the Statute of *Frauds* and *Perjuries*, should be Assetts in Equity to satisfy a Debt by Bond; and the Lord Chancellor inclined that it was, but respited his Decree till the Master had reported a State of the Cafe.

If the Equity of Redemption of a Mortgage in Fee shall be Assetts in Equity to satisfy Bond-Debts.

See the next preceding Cafe.

Clowdely versus Pellham.

Cafe 386.

19 Novembris.

Lord Chancellor.

THE Plaintiff's Bill was to have Satisfaction for a Debt owing to him by *Anthony Deane* deceased, who by his Will had devised all his Lands to the Defendant *Pellham* and the Heirs of his Body, with a Remainder over to another; and in another Part of his Will, reciting that he owed the Defendant *Pellham* Mony upon Account, he therefore devised to him all his Personal Estate, and made him Executor, willing him to pay his Debts.

One devises all his Lands to A and the Heirs of his Body, Remainder over, and in another Part of the Will devises to A all his personal Estate, and makes him Executor, willing him to pay his Debts. This is a Charge upon the Lands as well as on the personal Estate to pay the Debts.

Upon the reading of the Will, tho' the Clause as to Payment of Debts seemed to relate to the Personal Estate only, and tho' the Lands were devised to the Defendant in Tail with a Remainder over to another, and that it was objected that a Tenant in Tail could not be a Trustee, yet the Court decreed both Real and Personal Estate to be sold for Payment of the Testator's Debts.

Durston versus Sandys.

Cafe 387.

24 Novembris.

Lord Chancellor.

THE Defendant upon his presenting the Plaintiff to a Parsonage took a Bond of him to resign, which tho' in it self lawful, yet the Patron making an ill Use of it.

A perpetual Injunction awarded against a Bond of Resignation, the Patron making of an ill Use of it.

of it, *viz.* to prevent the Incumbent from demanding Tythes in Kind, the Court awarded a perpetual Injunction against the Bond.

Cafe 388.

Eodem die.

In Court

Lord Chancellor.

Marriage Bro-
cage Bond de-
creed to be
delivered up,
the Marriage
being had with-
out the Con-
sent of the
Woman's Pa-
rents.

2 Ch. Rep.
176.

Such Bonds
not to be coun-
tenanced.

Drury versus Hooke.

THE Bill was to be relieved against a Marriage Bro-
cage Bond: and it appearing that the Marriage was
brought about without the Consent of the young Wo-
man's Parents, who were then living, the *Lord Chancellor*
for that reason alone decreed the Bond to be delivered up,
terming it a sort of Kidnapping; and said, there was a
material difference, where the Parties were at their own
Dispose, and where their Parents were living: tho' such a
Bond was in no Cafe to be countenanced.

Cafe 389.

26 November.

Lord Chancellor.

A forfeited
Mortgage in
Fee decreed to
be personal Es-
tate, and to
belong to the
Executor, and
not to the
Heir.

..... versus Hicks.

UPON a rehearing of this Cause the sole Point in-
sisted on was, where a Man had by his Will devised
particular Legacies to his Executors, as he had likewise
done to his Heir, whether the Heir or Executor, there
being no defect of Assets, should have some Mortgages
in Fee made to the Testator, that had been forfeited in
his Life-time; and the Court confirmed their former De-
cree in favour of the Executor; but did admit, as this
Cafe was circumstanced, there was much to be said in be-
half of the Heir: but since it had been often very solemn-
ly settled, that all Mortgages should be looked on as part
of the personal Estate, and that it was now grown the
established Rule of the Court, it was not fit to alter it,
in order to accommodate one particular Cafe.

In the Argument of this Cafe was cited the Cafe of
Turner and *Crane* on the one Side, where an old forfeited
Mortgage of a Copyhold was decreed to the Heir: and

on

on the other hand the Case of *Baker and Thornbury*, settled in the Lord *Nottingham's* time, where in the Case of an old Forfeited Mortgage in Fee, tho' the Mony by the Provifo was made payable to the Heir, yet it was Decreed to be part of the Personal Estate: and the Case of *Noy* and *Ellis*, tho' the Mortgagors would not Redeem, yet the Land was Decreed to the Executors, against the Heir.

Ch. Rep. 283.

2 Ch. Rep. 220.

Coke versus Fountain.

Case 390.

Eodem die.

In Court,
Master of the
Rolls.

UPON a Motion the Defendant *Fountain's* Council moved, that they might be at liberty to read Depositions in this Cause, which were taken in a Cause where the Plaintiff's Father was a Party; the Suit being in all Matters the same: But on the other side it was objected, that the now Plaintiff not claiming as Heir, and his Father being only Tenant for Life, those Depositions could not be read against him: And after long Debate the Defendant had only the common Order for leave to read those Depositions at the hearing, saving just Exceptions.

Depositions taken in a former Cause cannot be read in another Cause against one who does not claim under the Party against whom those Depositions were taken.

It was said by Mr. *Serjeant Phillips*, that it is a common Case, where one Legatee has brought his Bill against an Executor, and proved Assets, and afterwards another Legatee brings his Bill, that he should have the Benefit of the Depositions in the former Suit, tho' he was not Party to it.

But if a Legatee brings a Bill against the Executor, and proves Assets, another Legatee, tho' no Party, may have the benefit of those Depositions.

Traiton versus Traiton.

Case 391.

27 Novembris.

Lord Chancellor.

THE Heir having had some Difference with his Mother the Jointress, relating to the Repairs of the Mansion-House, he settles the Estate upon his Brother, but first takes a Penal Bond from him of 500*l.* Penalty in the Name of the Defendant his Sister, that he should never suffer his Mother to come into the House. The Bill was to be relieved against this Bond.

One differing with his Mother settles his Mansion-House on his Brother, but first takes a Bond from him in his Sister's Name that the Brother should not permit his

N n n n n

The

Mother to
come into the
House.

Bond set aside
in Equity, as an
unnatural Bond.

The Court (tho' the Defendant insisted on the Breach of the Bond, and that thereby a Provision was intended her) Decreed the Bond to be delivered up, and cancelled; it being against the Law of Nature to prohibit a Son to cherish his Mother.

Cafe 392.

6 Decembris.

Lord Chancellor.

Ante Cafe 352.

Wall & Ux' versus Thurbane.

SIR George Crooke by his Will devised that his real Estate should descend to his three Daughters and Heirs, provided that his Wife should distribute it in such Proportions as she should think fit. The Mother by Deed executed in her Life-time appoints a very small Proportion for the Plaintiff's Wife, who was one of the three Daughters, and had appointed the rest for the other two Daughters; and the Bill was to be relieved against this unequal Distribution.

Upon long Debate the Court declared the Cafe was proper and relievable in Equity; for as the Mother here had appointed this Daughter a less Proportion than the other, so she might for some (it may be) causeless Displeasure have allotted her but one barren Acre only; and it would be hard if Equity in such a Cafe should not interpose: and if the Court might interpose in that Cafe, it can't then be objected, that the Court ought not to intermeddle, or wants Jurisdiction in the Cafe in Question: and it is discretionary in the Court, whether it shall relieve in this Cafe or not; and the Court took time to consider of it, and to be attended with Precedents.

In the Argument of this Cafe were cited the Cases of * *Ante Cafe 63. Cracer and Perrot*, and * *Gibson and Kinven*, where a Man by Will left his Personal Estate to his Wife, to be distributed amongst his Children at her discretion, and she gave all to one Child, and none to another, and the Court controlled that Disposition; such Clauses being generally intended to preserve Obedience only.

But

But *Note*, one main Reason in the Case last cited was, that the Wife had married a second Husband, and being under Coverture her Distribution might be influenced by her Husband's Authority.

Nevil versus Saunders.

Case 393.

Eodem die.

Lord Chancellor.

LANDS were given by Will to Trustees and their Heirs, in Trust for *Anne* the Defendant's Wife and her Heirs, and that the Trustees should from time to time pay and dispose of the Rents and Profits to the said *Anne*, or to such Person or Persons as she by any Writing under her Hand, as well during Coverture as being Sole, should order or appoint the same, without the intermeddling of her Husband, whom he willed should have no Benefit or Disposal thereof; and as to the Inheritance of the Premises in Trust for such Person or Persons, and for such Estate and Estates, as the said *Anne* by any Writing purporting her Will, or other Writing under her Hand, should appoint; and for want of such Appointment, in Trust for her and her Heirs.

Lands limited to *A.* in Trust for a Feme Covert, and that *A.* should receive the Rents and apply them as the Feme, whether sole or Covert, should direct.

This is a Trust, and not an Use executed by the Statute.

The Question was, whether this was an Use executed by the Statute, or a bare Trust for the Wife: and the Court held it to be a Trust only, and not an Use executed by the Statute.

Howe & al' versus Howe & al'.

Case 394.

7 Decembris

Lord Chancellor.

J. S. who had taken a Copyhold Estate for the Lives of himself and his two Brothers, dyes, leaving a Son: The Uncles during the Life of their Nephew suffer him quietly to enjoy; but now he being dead, they disturbed the Administratrix of their Nephew; and the Bill was brought by her to be relieved, as having the Title of the first Taker, who paid the Fine; the other two Lives being but in the Nature of Trustees for him.

A Copyhold Estate granted for the Lives of *A.*, *B.*, and *C.* *A.* dies intestate. His Administratrix shall have the Estate during the Lives of *B.* and *C.*

Upon

Upon long Debate the Court Decreed for the Plaintiff the Administratrix, against the Uncle; tho' it was taken Notice of and pressed in arguing for the Defendant, that there was not any Custom in the Manor, of which the Estate was held, that the first Taker might surrender; nor is there any such Custom where the Copies run *Successive*.

In the arguing of this Case were cited as Precedents of like Decrees, the Cases of *Powell* and *Theallwell*, * *Clarke* and *Danvers*, *Thynne* and *Bampfild*.

* 1 Ch. Rep.
310.

Case 395.
8 Decembris.

Powell versus Arderne and Chevall.

Lord Chancellor.

If a Defendant demurs, because the Bill contains several distinct Matters against several Defendants, he must by Answer deny Combination, which the Defendant had not denied by Answer, if it is charged by the Bill.

Defendant demurred, because the Plaintiff's Bill was brought against several Defendants for several distinct Matters. The Demurrer was Over-ruled, because the Plaintiff by his Bill had charged the Defendants with Combination, which the Defendant had not denied by Answer.

Case 396.

Barbon versus Searle.

11 Decembris.

Lord Chancellor.

After a Decree of Dismission affirmed on an Appeal to the Lords, Bill is brought for discovery of a Deed, said to be burnt pending the Appeal, which made out Plaintiff's Title, that after such Discovery Plaintiff might apply to the Lords for Relief.

Defendant upon a Demurrer ordered to Answer, but Plaintiff to proceed no further without Leave of the Court.

THE Plaintiff by his Bill, which was partly Original and partly a Bill of Review, set forth the Order made by the Peers in Parliament, whereby Clerke, the Plaintiff in the Original Cause, whose Interest the now Plaintiff hath, was relieved as to a Moiety of the Personal Estate, and dismissed as to the Real; and that such Order had not been made, but that the Defendant suppressed the Evidences, and had pending the Appeal (as the Plaintiff hath since discovered) burnt the Deed that made out the Plaintiff's Title; and therefore prayed the Defendant might Answer and discover the Matters aforesaid, the Plaintiff alledging in his Bill that he did not thereby design to Impeach the Order of the House of Lords, but that by this Discovery he might be capacitated to apply to the Lords

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in *Parliament*, when there should be a Sessions, for such Relief as the nature of the whole Case, when discovered, should require.

To this Bill the Defendant Demurred; and in arguing the Demurrer Serjeant *Maynard* for the Defendant insisted, that after a Judgment given upon an Appeal in the House of *Lords* this Court could not intermeddle further, than to settle so much of the Cause as the *Lords* had transmitted to this Court, which concerned only the Personal Estate; and that Matter this Court had already, pursuant to the direction of the House of *Lords*, determined; and that no Bill of Review would lye in this Case. That Bills of Review are not favoured, and are tied up to strict Rules; and for that purpose cited the Case of *Dummy and Filmore*, Ante Case 124.
2 Ch. Rep 133. where upon a Bill of Review the Court had decreed the whole Estate to the Plaintiff; and tho' it appeared even upon the face of the Decree, that the Plaintiff had a Title but to one Moiety only, yet it was there Resolved, that no Bill of Review would lye upon a Bill of Review; and the Defendant was left without Remedy. And he likewise cited *Morgan's Case*, where upon a Bill of Review the Plaintiff could not produce the Deed, and so failed at the Hearing of making out his Equity; and tho' the Deed came afterwards to his Hands, which plainly made out his Title, yet it was adjudged to be a Right without a Remedy, and the Defendant to be without Relief: and he likewise observed, that the Plaintiff's Title of his own shewing was only as Assignee of *Clarke*; and an Assignee can in no Case have a Bill of Review, much less an Assignee that comes in, as the Plaintiff did, *pendente lite*.

For the Plaintiff it was answered, that the Stress of the Serjeant's Argument was levelled, as supposing this to be a Bill of Review; whereas it was as well an Original Bill, as a Bill of Review; and that a difference had been commonly taken and allowed in this Court (tho' it was not necessary to maintain the Bill in question) between a Decree and a

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Dismission, (to wit) where there is a Decree, *that* is not to be alter'd but by Bill of Review; but where there was only a Dismission, an Original Bill might be brought upon a new Equity: and said, they did not pretend to say, that this Court could reverse or alter the Order of the House of *Lords*: But as there is little doubt to be made but that the Parliament, if it had been sitting, upon a Petition would have directed this Matter to have been examined in this Court, in regard that it is not the course there to take Answers upon Oath; so in the Interval of Parliament, when we cannot obtain such Direction, this Court may well proceed to have a Discovery of this Matter; or else by Death or otherwise the Plaintiff peradventure may lose the benefit of it; so that this Bill is not to change or alter the *Lords* Order, but in effect auxiliary to the Proceedings before them.

The Court hereupon ordered the Defendant to answer the Bill; and when he had so done, the Plaintiff was not to proceed any further without the special Leave of the Court.

Case 397.

Eodem die.

Lord Chancellor.

If a Mortgagor agrees the Mortgagee shall enter, and hold till he is satisfied; length of time is no Objection to a Redemption.

Orde versus Heming.

THE Bill was to redeem a Mortgage; and the Defendant demurred, by reason that of the Plaintiff's own shewing it appeared, the Mortgage was 60 Years old.

The Demurrer upon Argument was over-ruled, because it was charged in the Bill, that the Mortgagor agreed the Mortgagee should enter and hold, till he was satisfied; which is in the nature of a *Welch* Mortgage; and in such Case the length of time is no Objection.

The

The Earl of Kildare versus Sir Morrice
Eustace and Fitzgerald.

Case 398.

3 Decembris.

Lord Chancellor

Lord Chief Jus-

tice Bedding-

field.

Lord Chief Ba-

rros Atkins.

Ante Case 377.

Post Case 399.

404. 11.

THE Lord Chancellor and the Judges having been attended with Precedents, Sir John Holt argued for the Plaintiff, as to the preliminary Point only, (to wit) whether this Court had Jurisdiction, and might hold Plea of the Lands in question which lay in Ireland. First, That a Trust was purely personal; and that a Court of Equity here might as well hold Plea of a Trust, that concerned Lands in Ireland, as the other Courts of Law might of other personal Contracts, tho' the same might concern Lands in Ireland: As if a Man being here in England enters into Bond for granting a Rent-charge out of Lands in Ireland, there is no Question but it may be sued in any of the Courts of Law here: so a Covenant enter'd into in Ireland, or a Contract made there, may be sued here; and so *e converso*. And it has been held, (it is my Lord Hobart's Opinion) that an Action of the Case will lye for a Breach of Trust. Secondly, That Ireland hath its Courts of its own by Grant from the King; but not exclusive of the King's Courts here, for Ireland is a conquered Kingdom; and a Decree of this Court may as well bind Land in Ireland, as by every Day's Practise it doth Lands that lye in foreign Plantations: and for Precedents cited the Case of a *Scire fac'* (20. H. 6. fol. 8.) brought in the Chancery here to repeal a Patent of Lands in Ireland. If a Man, that is beneficed here, is made a Bishop in Ireland, that comes within the Statute of H. 8. against *Pluralities*, and shall make void his Living here in England; and it was resolved in *Evans and Ascough's Case*, *Latch. fol. 234.* and *Dowdale's Case*, in *Co. 6th Report*, that Lands in Ireland shall be Assetts to satisfy a Bond-debt here, but otherwise of Lands in Scotland. And the necessity of the Case is considerable; for should not this Court relieve in such a Case

as this, where the Land lies in *Ireland*, and the Trustee lives in *England*, the *Cestuy que trust* would be without remedy; for tho' it is true, we may serve him with a *Subpœna* out of this Court, returnable in the *Chancery* in *Ireland*; yet if he will not appear upon that *Subpœna* we can proceed no further; we cannot take out any *Attachment* upon it. And for Precedents in this Court of Decrees made concerning Lands in *Ireland* were cited the Cases of *Leake* and Lord *Ranelagh*, 8. Car. 1. in the Lord Keeper *Coven-try's* time. *Archer* and *Preston* soon after the *King's Restoration*, and the Case of the Lord *Thomond* and *Spencer*.

The Defendant's Council in a manner waved the preliminary Point, and would not enter into the Debate, whether this Court might not decree the Trust of Lands in *Ireland*, the Trustee living here; but that it was certainly a Matter discretionary in the Court, whether they would do it or not: and that as this Case was circumstanced, they apprehended the Court would not interpose. *First*, That in this Case there had been no less than two Judgments in the Courts of Law in *Ireland*, and no less than three Bills in Equity. *Secondly*, That Sir *Morrice Eustace* the Trustee did not live in *England*, but came here occasionally upon other Business; and that it would be unreasonable to keep him from his own Country, and from all his other Concerns, to attend this Suit. *Thirdly*, That the Case arises upon Facts properly triable in *Ireland*, to wit, whether *Fitzgerrald*, for whom this Trust was created, was the same *Fitzgerrald* that was in the Rebellion; and this Fact had been twice tried in *Ireland*, and found against the Plaintiff. *Fourthly*, That this Case depends upon Construction of the Act of Settlement in *Ireland*; for if not only the Trust, but the Land it self, was actually vested in the King by that Act, then it was a pure Title at Law, and no ground for a Suit in Equity: and that the Lands were so actually vested, was the Opinion of the *Chancellor* and *Judges* in *Ireland*, who were the proper Expositors of that Law. And it was further insisted, that Trusts which concern Lands are
not

not purely Personal; but in some sort Local; as particularly in the remedy by Injunction for the Possession: and that now Sequestrations are become a common Process, tho' at first introduced in the Lord *Bacon's* time, and then but sparingly used in Process, and after a Decree to sequester the thing in demand only. And now likewise Bills are common here for a Partition, which seem to concern nothing but the Land it self; but that was grounded upon the Statute, which makes one Tenant in common Accountable to the other; so that now since the Statute, they are become as it were Trustees the one for the other. Nor is the Plaintiff remediless, his Trustees living in *England*, if that were so, for a Decree made in *Ireland* may be carried into an Execution by *English* Bill in this Court against his Trustee here. And for Precedents where this Court refused to hold Plea of Lands in *Ireland*, they cited Sir *William Pettit's* Case, where the Bill being to have a Partition of Lands in *Ireland* was dismissed (*but note in that Case as to the Matter of Account it was retained*) and in the Case of the *Countess of Lancharle* against *O Bryan*, 24 *Car' Secundi*, upon Articles of Marriage, all the Transactions having been in *Ireland*, the Bill was dismissed.

Sequestrations first introduced in Lord *Bacon's* time.

Bill for a Partition of Lands in *Ireland* dismissed, but an Account of Profits Decreed.

The Plaintiff's Council having before spoke only to the Preliminary Point touching the Jurisdiction of the Court in case of a Trust of Land in *Ireland*, which was now waved by the Defendant's Council, and the Court satisfied as to that Matter; and the Lord Chancellor inclining to dismiss the Bill, because the Case turned upon Construction of the Act of Settlement, and upon a Fact which was proper to be tried in *Ireland*, and not here, our Law differing from the Law in *Ireland*; it was replied by the Plaintiff's Council, that the Courts of Law in *England* were proper Expositors of the *Irish* Laws; nay their Judgment is to control the Opinion of the Judges in *Ireland*, as upon all Writs of Error; and *a fortiori* may they take upon them to Judge of a Matter or Expound a Law, that comes before them in the first Instance: and that there is

no difficulty in trying here, whether this be the same *Fitzgerrald* or not; it may be done here as well as in *Ireland*. And as touching the Act of Settlement, tho' the same be copiously penned, and hath the Words, Trusts, Equities, &c. and that all shall be actually vested in the King; yet the Construction of that Act is natural and plain, and must be taken *reddendo singula singulis*, that is to say, Lands in Possession vest absolutely in Possession, a Trust vests as a Trust, and the like, and amounts to no more than that they shall be as much in the King's actual Possession, as if an Office was actually found; and so has it been resolved here upon other Statutes of Attainders, that have as liberal Clauses as this Act of Settlement has.

¹ *Med.* 16. The Case of *Smith* and *Wheeler* in the *King's Bench* concerning *Simon Maine's* Estate, being the first Case there settled by the Lord Chief Justice *Hales*. Lord *Holland's* Case on the Statute of *H. 8.* and *Powly's* Case.

Judges in *England* proper
Expositors of
the Laws in
Ireland.

After long Debate, the Judges concurring with his Lordship, that the Court had a proper Jurisdiction in this Case, and that the Judges in *England* were proper Expositors of the *Irish* Laws, and that by the true Construction of this Statute the Trust was vested in the *King*, and not the Land it self, and the Proof being full as to the Identity of the Person, decreed for the Plaintiff, as to one Moiety; the Trust as to the other Moiety being for Sir *Morrice Eustace* himself, and not for *Fitzgerrald*.

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Termino S. Hillarii,

2 & 3 Jacobi II. 1686.

IN CURIA CANCELLARIÆ.

The Earl of Kildare versus Sir *Morrice Eustace & al.*

Case 399.

25 Januar.

Lord Chancellor.

Lord Chief

Justice Bed-

dingfield.

Lord Chief Bar-

ron Atkins.

Ante Case 377.

398.

Post Case 404.

411.

THE Defendant having obtained an Order for the rehearing of this Cause, Mr. *Pollexfen* argued for the Defendant, singly as to that Point, that by the Act of Settlement not only the Trust, but the Lands themselves, as this Case was, were actually vested in the King, and consequently what Title the Plaintiff had, was purely a Title at Law, and not a Trust or equitable Title; and put the Case shortly thus, (*viz.*) that Sir *Morrice Eustace* being an innocent Protestant was possess of the Lands in Question for the remainder of a Term for Years in Trust for *Fitzgerrald* being an innocent Papist, and that the Lands in question were actually seized by the late pretended Commonwealth, and the *Custodiam* of them granted. And the Fact was admitted so to be, and was so stated in the Plaintiff's Bill.

And first he observed that if the Words of the Act would bear it, it was but reasonable that the Estate in Law should vest and go along with the Trust, it being no prejudice to any one: the Trust being the Substance, and the

the Estate in Law, but as it were, the Shadow. *Secondly*, That the design of the Act was the establishing the Possessions of these forfeited Lands, and to make the Title unquestionable; which Intent is best answered by vesting, not only the Trust, but the Lands themselves; and the Act is fully and liberally penned for that Purpose. That these Lands are actually vested by the enacting Clause, *viz.* All Land whereof any Soldier or Adventurer was in Possession, or whereof the King was in Possession, or whereof the *Custodiam* was granted, or that was seized or sequestred by the pretended *Common-wealth*, or that any Person by or under their Title or by reason of the late War received the Rents or were in Possession on the *seventh of May 1659*. Now the description of having the *Custodiam* granted, of having been seized and sequestred &c. comprehended the Lands in Question. That as to the Objection, that the vesting words must be taken *reddendo singula singulis*, that is, that Lands in Possession shall be vested as Lands in Possession, a Trust of Land vested as a Trust, &c. that may hold of Lands not included within those particular Descriptions; but to apply such Construction to such Lands so described, were to render all those particular Descriptions and the main Body of the Act fruitless and nugatory. That the particular Exception in the Proviso, as to Protestant's Estates, strengthens the vesting Clause as to the Lands and Trusts of nocent Papists: and that the particular penning of this Act distinguishes this Case from all the Cases upon other *English* Acts for Forfeitures.

Sir *John Holt* argued for the Plaintiff, that this Act of Parliament was made for these special Purposes. *First*, To supply the defect of Attainders. *Secondly*, The want of Inquisition and default of Office. *Thirdly*, That Trusts in *Ireland* were not forfeited before this Act; nor were the Trusts of Inheritances in *England* forfeited before the *Stat* 33. *H.* 8. as is resolved *Co. 7. Rep. fol. 34.* and insisted on the Case of

1 Mod. 16.

Smith and *Wheeler*, and that a Trust shall vest as a Trust only, and that where a Traitor was to have an Estate on

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performance of a Condition, there notwithstanding the vesting Clause the King must perform the Condition. And as to the Exception, a cautionary Proviso cannot enlarge the enacting part.

The *Lord Chancellor* inclined, that the Estate in Law as well as the Trust was actually vested; but recommended the Case to the Judges for their further Consideration.

Cock versus Berrish.

Case 400.

26 Januar.

J. S. makes his Will, and the Defendant *Berrish* and another Executors, and devises to them Legacies of 20*l.* a-piece, and likewise devises to them 800*l.* in Trust for the Payment of several Annuities to *A, B,* and *C,* for Life, far exceeding the Interest of the 800*l.* and devises the Surplus of his Estate to his Nephews *Charles Cock* and *John Cock,* equally to be divided betwixt them, and appoints the same to be paid to his Executors, in Trust to be laid out for the Benefit of the residuary Legatees. One of the residuary Legatees dies in the Life-time of the Testator, and the other happens likewise to die within two Years after the Testator's Death.

Lord Chancellor.

A devises the surplus of his Estate to his two Nephews, equally to be divided between them, and appoints his Executors to lay it out for their Benefit. One of them died in the Testator's Life-time.

The whole decreed to the Survivor and not to the Executors, the Testator not intending them any Benefit.

The first Point was, Whether, in regard by the Devise of the Surplus *Charles* and *John Cock* were Tenants in common and not joint Tenants, the Survivor should have the whole Surplus. And the Court decreed him the whole; the Design of the Will shewing the Testator chiefly intended their Benefit, and not any Advantage to his Executors, who were in a manner Strangers and but remotely related; and the rather for that, tho' the Devise is not wholly joint, but severed by the Words *equally to be divided*; yet in the latter Clause, where he appoints the Executors to lay out the Mony for their Benefit, there it is joint again.

A Second Question was, Whether, the Annuities being determined by the Death of the Annuitants, what remains of

A gives 800*l.* to his Executors on trust to pay Annuities to *B* and *C,* for their

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Lives, exceeding the Interest of the 800 l. and gives the Surplus of his Estate to D and E. The Annuitants being Dead, the 800 l. shall go to the Residuary Legatees, and not to the Executors.

of the 800 l. should go to the Executors, or to the surviving residuary Legatee. Decreed also with the Plaintiff, it not being a Conditional Devise to them of 800 l. paying such and such Annuities, but only deposited in their Hands in Trust for the Payment thereof: and as they were no way obliged to pay more than the 800 l. so there is no reason that they should have the Benefit of what remained unexhausted of the 800 l. in Payment of the Annuities.

Cafe 401.

28 Januar.

In Court,
Master of the
Rolls.

A Purchasor or Assignee, who comes not in in privity, is not intituled to bring a *Scire fac'* to revive a Decree.

A Demurrer may be put in to a *Scire fac'* to revive a Decree.

Dunn versus Allen.

THE Plaintiff purchased the Manor of *Lenthall* in the County of *Hereford* of Sir *Sampson Eure*, who, upon Articles of Agreement made betwixt him and his Tenants for the settling of Herriots and stinting the Common, obtained a Decree for Confirmation thereof. The Plaintiff first brought a *Scire fac'* to revive this Decree, which was discharged by the late *Lord Keeper North*, in regard that the Plaintiff, who claimed as a Purchasor or Assignee, and comes not in in privity, is not intituled to bring a *Scire fac'* to revive the Decree: but the same was discharged without Costs, for that the Defendant did not Demurr to the *Scire fac'*, as the *Lord Keeper* said he might have done.

And now the Plaintiff brought his Bill to revive the Decree, and prayed no other Relief; to which the same Objection was made, as had been before to the *Scire fac'*; the Plaintiff being no more intituled to bring a Bill of Revivor than a *Scire fac'*; there being no other difference betwixt them, save only that a *Scire fac'* lies, when a Decree is signed and inrolled, and a Bill of Revivor upon an Abatement before such time as the Decree is signed and inrolled: but an Assignee or a Purchasor, who came not in in privity, can in no Case revive; but ought to bring an Original Bill to have a Parallel Decree made; in which it may be used as a good Argument or Inducement to the Court, that there was such former Decree, to make a like Decree, if no sufficient Reasons are shewed to the contrary:

but

but the former Decree can no ways be revived, nor carried into an Execution, save only by the making a Parallel Decree; and the Plaintiff hath now no such Bill: And this was the Objection as to the Form; and as to the Matter, it appeared of the Plaintiff's own shewing, that this Agreement was made only betwixt Persons that were bare Tenants for Life; for on the one hand Sir *Sampson Eure*, the Lord of the Manor, was but Tenant for Life; and on the other hand the Tenants were but likewise Tenants for Life, by Settlements made precedent to these Articles, on which the Decree was founded; so their Agreement could in no sort bind, on the one hand or the other, the Persons who upon the respective Deaths of the Tenants for Life became Tenants in Tail.

A Decree for confirming an Agreement between the Lord and his Tenants for settling Heriots and stinting the Common revived by a Bill brought by a Purchaser who did not come in in Privy, and confirmed, tho' the Lord and his Tenants were only Tenants for Life.

But *Quære*.

But the *Master* of the *Rolls* was of Opinion, that these Articles tending to settle the Customs of the Manor, which were Immemorial, and before the Statute *de Donis*, and for stinting the Common and preventing Suits, ought to bind the Issue in Tail, tho' made only by Tenant for Life: and he would not presume, that the Tenant in Possession would do any thing in prejudice of the Tenants right: and Decreed that the former Decree should be confirmed, and revived and executed. *Quære*.

Beard versus Nuttball.

Case 402.

29 Januar.

In Court,
*Master of the
Rolls.*

THE Plaintiff's Husband after Marriage enters into a Voluntary Bond to settle a Jointure of the Value of on his Wife, and afterwards settles Lands of that Value upon his Wife in Jointure, and thereupon the Bond was delivered up to be cancelled. The Husband dies, and the Jointress is evicted. The Bill was that the Wife being Administratrix of her Husband might retain of her Husband's Personal Estate against the Defendants, who claimed a Share of the Personal Estate upon the Statute of Distributions, to the Value of her Jointure; there being no Creditors in the Case.

Voluntary Bond after Marriage to make a Jointure to a Wife, Husband accordingly makes a Jointure. Wife gives up the Bond, the Jointure is Evicted. The Jointure shall be made good out of the Husband's Personal Estate.

The

The Court ordered that in regard the Plaintiff was now become intitled to Dower, that she should proceed at Law for Recovery thereof, and what the same should fall short in Value of the Jointure, should be retained by her out of the Personal Estate, notwithstanding the Bond was after Marriage and voluntary, and delivered up to be cancelled: For an Agreement, tho' voluntary, under Hand and Seal, ought to be Decreed by this Court: and the Delivery up of the Bond by a Feme Covert could no way bind her Interest.

March versus Bennett.

Cafe 403.

1 Februar.

*In Court,
Master of the
Rolls.*

Whether the Court will Decree Satisfaction of a Bond-Debt of the Ancestor out of the Profits of the Real Estate during the Minority of the Infant Heir, where there is a Deficiency of Personal Assets.

THE Bill was to be relieved against an old Bond entered into by the Plaintiff's Father, on which the Plaintiff was now sued as Heir to his Father; and it appearing that the Plaintiff's Father left no Personal Estate, but left an Estate in Fee Simple of 300 *l. per Ann.* which descended to his Son, who was then but *two* Years old, the *Master of the Rolls* took it to be a strong Objection, that in almost 20 Years time this Debt was never demanded of the Heir: To which it was answered, that during the Plaintiff's Minority they had no Remedy, nor could compel the Infant's Guardian to pay the Debt out of the Profits of the Infant's Estate; nor was ever any such Decree made in this Court. But the *Master of the Rolls* declared he thought such Decree to be just and equitable; and if such Cafe came before him he would decree Satisfaction out of the Profits of the Infant's Estate. *Sed dubitatur.*

Cafe 404.

4 Februar.

*Lord Chancellor,
Lord Chief Justice
Beddingfield.*

*Lord Chief Baron
Atkins.*

Ante Cafe 377.

398. 399.

Post Cafe 411.

The Earl of Kildare versus Sir Morrice Eustace.

THIS Cause coming on this Day to be Re-argued, there were two Points made by the Plaintiff's Council: *First*, Whether the Estate in Law was executed by the Act of

of Settlement. *Secondly*, Admitting it was so, yet whether the Defendant having no right to one Moiety, as appears by his own Answer, either in Law or Equity, the Plaintiff ought not to have a Decree for that Moiety.

As to the first Point, the *Lord Chief Baron* seemed still to doubt, whether the Estate in Law was executed by this Statute: But the *Lord Chief Justice* and *Lord Chancellor* were clear of Opinion, that by the particular penning of this Statute, not only the Trust, but the Estate in Law, was actually vested in the King, and well granted to the Plaintiff's Trustees.

As to the second Point, it was insisted on by the Council for the Plaintiff, that he ought to have a Decree for the Moiety; for that it appearing by the Defendant's own Answer that he had no Title thereunto (taking *Fitzgerrald*, who was the Owner of this Estate, to be one and the same Person with that *Fitzgerrald* who was the innocent and forfeiting Person, as was clear by the Proofs in the Cause he was the same Person) it was then against Conscience to suffer the Defendant, who had the good Fortune at Law to obtain a Verdict for the whole, to take out Execution thereupon, and to put the Defendant about to try his Fortune at Law again; and the rather for that it had been a doubt, and there were different Opinions amongst the Judges in *Ireland*, whether the Estate in Law was vested in the King or not: and tho' it is objected that where a Man has a Title at Law he ought to pursue his legal Remedy, and shall not have a Decree in Equity; yet that is not always so; and the daily Practice of this Court in many Cases is otherwise: as where a Creditor by Bond or the like brings his Bill for a discovery of Assets, and having proved Assets here, he shall have a Decree for his Debt, and not be put to prosecute at Law for the same; and in many such like Cases the Court never sends the Plaintiff to Law where a Title appears for him: and besides in this Case there was a Necessity of a Decree for the

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Plain.

Plaintiff against his Trustees, who were only Patentees in trust for the Plaintiff: and it appearing to the Court that he had a Title against all the other Defendants, the Decree ought to be uniform, and made against them all: and this the Court thought reasonable: But in regard this Matter was new, and had not been before under Consideration, the Court took time to consider further of it, and to hear what the Defendant's Council had to say to it.

Case 405.

Eodem die.

In Court,

Lord Chancellor.

Lord Chief
Justice Bed-
dingfield.

Lord Chief Ba-
ron Atkins.

Ante Case 375.

Post Case 410.

Earl of *Winchelsea* versus *Norcliffe*.

THE Lady *Winchelsea* having Issue by her former Husband Sir *John Wentworth* two Sons, viz. *Thomas* the eldest Son, and *John* her second Son, settles the Lands in question to the Use of herself for Life, Remainder to *John* her second Son and his Heirs, he paying unto *Katherine* her Daughter 1200*l.* within six Months after the Estate should fall in Possession; provided if *Thomas* the eldest Son should die without Issue, so as his Estate should come to *John*, that then if *John* did not within six Months afterwards pay 1500*l.* to *Katherine*, the Lands should go to *Katherine* and her Heirs. *Thomas* dies without Issue, so that his Estate came to *John*, who was under Age and neglected to pay the 1500*l.* and in truth the Lands were not worth that Money; and *Katherine* being dead without Issue, the question was between the Earl of *Winchelsea* the Administrator of *Katherine* his Daughter, and Dame *Elizabeth Finch* Sister and Heir of Dame *Katherine*.

The Plaintiff insisted that this was only in the nature of a Security for Money, and that consequently he became intitled thereunto as Administrator; and the Defendant insisted, that it was not a bare Security for Money, but rather in the nature of a Settlement, and a plain Limitation of the Estate over upon default of Payment at the day appointed, and that therefore she ought to have this Estate, as being Heir at Law to Dame *Katherine*; and the

the rather for that *John*, who had the Title of Redemption in case the Estate was redeemable, desires not to redeem the same.

The *Lord Chancellor* with the Concurrence of the Judges dismissed the Plaintiff's Bill, declaring it was not in the nature of a Security for Money, but a Settlement with a plain Limitation over upon default of Payment to Dame *Katherine* and her Heirs; and the plain Intention of the Party appears to be upon the face of the Deed, by the different Penning of the two Provisoes, that in the latter Case the Land it self in default of Payment should go over to the Lady *Katherine* and her Heirs: And to make this a redeemable Estate was to destroy the known difference in the Law Books between a Condition and a Limitation over.

Lord Hollis versus *Lady Carr & al'*.

Case 406.

5 Februar.

In Court.

Lord Chancellor.

THIS Cause coming on this Day to be heard again, and the Plaintiff by his now Bill seeking Relief upon the Will of Sir *Robert Carr*, who had devised his Lands for Payment of his just Debts, it was insisted for the Defendants, that the Plaintiff's Debt was not within the intent and meaning of this Provision for Payment of Debts; that Sir *Robert Carr* always obstinately opposed the Payment of it, and looked upon it, that he was surprized and circumvented in the Covenant obtained from him, when he was but just come of Age, and a Student at *Cambridge*, for the Payment of his Sister's Portion, to which he was no way liable: and that therefore he always refused to levy a Fine, whereby to subject his Lands for Payment of it, altho' he was decreed so to do. And they cited the Case of *Hollis* and *Norden*, where a Debt, that the Party had always contested to the last, was by the Lord Keeper *North* adjudged not to be within the Intent of a Provision made by a Person for Payment of all his just Debts. And such Provisions have not been extended to all sorts of Debts: as Debts that

One devises his Lands for Payment of his just Debts. Testator, while a Student at *Cambridge*, had been by surprize prevailed upon to give a Covenant for Payment of a Portion to his Sister; but afterwards the Testator all along contested this Debt; yet decreed this to be a Debt to be paid within this general Provision.

Aste Case 135.

Debts arising by a Mifseazance, as for an Escape or Breach of Trust, or contracted *mala fide*, not within a general Provision for Payment of Debts.

that arise by a Mifseazance, as an Escape or Breach of Trust, which were contracted *mala fide*, have never been taken to be within a general Provision made for Payment of Debts.

Lord Chancellor. Sir Robert Carr has devised his Estate for Payment of all his just Debts; and the Plaintiff's Debt must now be taken to be such, the Law has said it is a just Debt; and had not Sir Robert Carr devised his Lands for the Payment of his Debts, they would have descended on his Heir, and been Assets in her Hands, and liable to have satisfied the Plaintiff's Demand on Sir Robert Carr's Covenant; and therefore Decreed the Debt with Interest.

Cafe 407.

Eodem die.

In Court,

Lord Chancellor.

Ante Cafe 299.

311.

Post Cafe 446.

Stapleton versus Sherrard.

THE Matter in Question concerned the Right and Distribution of the Personal Estate of an Inhabitant of the Province of York, who died intestate.

Per Cur'. The Saving in the Statute for Distribution of Intestates Estates goes only to the Customary Part, and the Testamentary Part is out of the Custom, and must go in a course of Administration, and be distributed according to the Statute.

Cafe 408.

Eodem die.

In Court,

Lord Chancellor.

A and B being

about to Marry

surrender their

respective

Copyhold Es-

tates to the

Use of them

two and the

Survivor. The

Man dies before

the Marriage,

and the Woman

enters on his

Land, and after

30 Years quiet

Hamond versus Hicks.

UPON a Treaty of Marriage, the Man and Woman having each of them Copyholds of Inheritance; they mutually surrender the same to the Use of them two and the Survivor of them, and before any Marriage was had the Man happens to die. Upon his Death, which was about thirty Years since, the Woman by vertue of the Man's Surrender enters on his Copyhold Estate, and enjoyed the same ever since. The Heir of the Man now brought this Bill to have the Estate resurrendred, and for an Ac-

count

count of the Profits, insisting, that the Marriage never took effect, and that it was a Trust for the Husband and his Heirs until the Marriage took effect.

Enjoyment the
was decreed to
surrender to the
Heir and ac-
count for the
Profits.

The Lord Chancellor decreed a Resurrender, and an Account of the Profits from the Death of the Man.

Aspinwall versus Case & al'.

Case 409.

8 Februar.

In Court,
Lord Chancellor.

SIR Gilbert Ireland, by Deed executed in his Life-time, makes a Lease for 500 Years to six Trustees therein named, with a Power to make Leases for 21 Years or 3 Lives at any time within One and thirty Years after the Death of Sir Gilbert and his Lady, and the Survivor of them; and this is thereby declared to be in Trust for the Payment of his Debts, and that the Surplus should be to and for such Purposes as he should by his Will direct and appoint; and gives to two of the Trustees that were intended to be the acting Persons 20*l.* per Ann. for their pains; and there is a Proviso, that if such Person to whom the Inheritance should belong, should confirm such Leases as should be made by the Trustees, and undertake the Payment of such Debts as should be then unpaid, the Term for 500 Years should cease, &c. And by Will of the same date, reciting the Deed and Power to dispose by Will, appoints that the Trustees should have the Surplus to be received by Profits and raised by leasing within the 31 Years after the Decease of Sir Gilbert and his Lady and the Survivor of them, without Account; and devises the Reversion to the Plaintiff for Life, and to his first and other Sons in Tail.

The Plaintiff by his Bill offered to pay all the Debts, and sought to be relieved against this Power in the Trustees for making Leases during the 31 Years. And for the Plaintiff it was insisted, that this was a very strange and unusual sort of Settlement, and upon the Face of it appeared

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to

to have been a Surprize upon Sir *Gilbert* by the Contrivance of Mr. *Entwisle*, who drew the Conveyance; and the principal Matter intended by the Deed appeared to be only a Provision for Payment of Sir *Gilbert*'s Debts, and settling the Reversion upon his Kindred and Relations, and that the Trustees should have no other Benefit save only the 20 *l. per Ann.* provided by the Deed it self; there being no mention in the Deed that Sir *Gilbert* intended to do any thing for the Benefit and Advantage of the Trustees: And should the Trustees be suffered to make Leases for 21 Years or *three* Lives according to the Power of the Deed, it will be a vain and idle Provision that is made for the Plaintiff for Life, with Remainder to his first and other Sons in Tail; for the Trustees in the last Year of the 31 may fill up Estates for 21 Years or *three* Lives; so that in probability neither the Plaintiff nor any Son of his will have any Benefit by it; and the Court might with Justice, when the Plaintiff offered to pay the Debts, restrain the Trustees in their Power to Lease: And some Proof was offered tending to an ill Practice in Mr. *Entwisle* in the making and contriving of this Settlement.

Lord Chancellor. Sir *Gilbert* has expressly given the Surplus of the Profits to the Trustees, and I cannot take it from them; he might have given his Estate to a *Fidler* for a Song: and I know Sir *Gilbert* was in doubt which way to dispose of his Estate, and that he had a Personal Kindness and Friendship for some of the Trustees, and no good Opinion of the Plaintiff; and therefore pronounced a Dismission of the Plaintiff's Bill. But afterwards a Proposition was made by the Plaintiff's Council, and accepted of by the Defendant, who was then in Court, that the Plaintiff should take upon him the Payment of the Debts resting unpaid, and should pay the Trustees for their own Benefit 600 *l.* and they not to account for any Profits already received, and that thereupon the Plaintiff should have the Estate and Interest of the Trustees assigned unto him.

Earl of *Winchelsea* versus *Norcliffe*.

THE Case was, that the Trustees of the Estate of *Thomas Wentworth*, an Infant, having a Sum of 3000 *l.* in their hands, which they had raised out of his real Estate, invested the same in Lands, which lay commodious to the Infant's Estate; and took the Conveyance thereof in their own Names, but thereby declared the Trust to be for the Benefit of the Infant; in case the Infant when he came of Age should accept the same at the Rate they had bought the Estate, and discharge them of the 3000 *l.* and this was done with the Consent of the Grandmother, who was the Infant's Guardian. The Infant died under Age, and the Question now was, whether the Heir of the Infant should have those Lands, or whether the Purchase should be left upon the Hands of the Trustees, and they to Account to the Administrator of the Infant for the 3000 *l.*

Mr. Justice Lutwich. Neither the Heir nor the Administrator have any Title to the Lands; here was only a bare Election in the Infant, in case he had lived to come of Age, and that Election cannot now be made; and therefore he held, that the Trustees were accountable to the Executor or Administrator for the 3000 *l.*

Lord Chief Baron Atkins. Of the same Opinion.

Master of the Rolls differed from the Judges, and held that the Heir of the Infant ought to have the Land; and observed that the 3000 *l.* was not taken out of the Infant's Personal Estate, but had been raised and saved by and out of the Profits of his real Estate; and that the Trustees had acted honestly and for the Benefit of the Infant; and that it was but reasonable they should have such a Power in them: for a Purchase of Lands, that lye commodious to a Man's Estate, may not be always to

Case 410.

19 Februar.

In Court,

Lord Chancellor.

Master of the

Rolls.

Lord Chief Ba.

ron Atkins.

Mr. Justice

Lutwich.

Ante Case 275,

403.

Trustees of an Infant having saved 3000 *l.* out of the Profits of his Estate lay it out in a Purchase of Lands lying near the Infant's Estate, with the Consent of his Grandmother;

Declaring the Trust for the Benefit of the Infant, if he when at Age shall agree to it.

Infant dyes within Age; the Trustees shall account to the Infant's Executors for the 3000 *l.* but the Profits of the Land set against the Interest.

be had; and here being no Creditor in the Case, he thought the Heir ought to be preferred before the Administrator: and took notice of the Case of *Dennis* and *Badd* cited at the Bar, where the Committee of an Ideot had bought in a Mortgage that was upon the Ideot's Estate, and the Estate descended to another Ideot; and tho' the Mortgage was kept on foot by an Assignment in Trust, yet in that Case it was decreed in a Bill brought by the Committee, that the Lands should go to the Heir, and that the Mortgage should not be taken as Personal Estate; and an Heir shall by the Course and Justice of this Court have the Personal Estate applied in case of the Real, and to discharge Mortgages, tho' there be no Covenant for Payment of the Mortgage Money. And in case the Trustees had come to this Court, and shewn how it would be for the benefit of the Infant to have had this Money thus laid out, he did not doubt, but that the Court would have decreed it accordingly.

Lord Chancellor concurred in Opinion with the Judges, and held that the Trustees must account for the 3000 *l.* to the Executor; and said there was a plain Difference betwixt this Case, and that of *Dennis* and *Badd*; for in that case had the Money come to the Hands of the Executor, yet in his Hands it would have been liable in Equity to the Debt due by Mortgage, and the Heir should have compelled him so to apply the same: so that there the Trustees did no Wrong or Prejudice to the Executor, nor more than what the Executor himself might have been compelled to have done. And he did agree that if the Trustees had come to this Court and had obtained a Decree for the investing this Money in a Purchase, this Court would have maintained its own Decree: but not having so done, but voluntarily put an Election in an Infant, who never made any, he thought they remained accountable for the 3000 *l.* as being part of the Infant's Personal Estate; and said the matter that had been pressed at Bar by Mr. Serjeant *Rawlinson*, had not been answered,

viz.

viz.^b that the Infant at *Seventeen* Years might dispose of his Personal Estate, tho' he could not of his Real; but if his Trustees at their Pleasure might turn and convert his Personal Estate into a Real, they thereby would debarr the Infant of the Right and Privilege which the Law gave him, and might at their pleasure advance the Heir, and prevent an Infant from providing for his younger Children, which was unreasonable; and therefore decreed the Trustees to pay the 3000 *l.* to the Administrator, with Interest only according to what they had made by the Profits of the purchased Lands.

Another matter, which was made a Doubt of in this Case was, whether those of the half Blood should have an Equal Share of an Intestate's Estate with those of the whole Blood; and the Court unanimously agreed that those of the half Blood must have an equal Share; tho' the Lord Chancellor said, that till the Case of *Smith* and *Tracy*, 27 and 28 *Car* 2. at *Doctor's Commons*, they gave but half a Share to one of the half Blood, and it was so done in the Case of one *Brown*; but since the Case of *Smith* and *Tracy* that matter has been settled; and those of the half Blood have always had an equal Share with those of the whole Blood; and *Cook* upon *Littleton* distinguishes betwixt those of the half Blood as to Descents; but as to Administration and Personal Estates they are all one.

Those of the half Blood shall share equally with them of the whole Blood in the distribution of an Intestate's Personal Estate.

Ante Case 375.

Earl of *Kildare* versus *Eustace*.

Case 411.

Eodem die.

In Court

Lord Chancellor.

Master of the

Rolls.

Chief Baron

Atkins.

Ante Case 377.

398. 399. 404.

THIS Cause standing this Day again in the Paper to be heard, it was insisted for the Plaintiff, that let the vesting Point be one way or other, the Plaintiff had a proper Case for a Decree; for that he had apparently a Right, at least to one Moiety; and tho' in case the Estate in Law vested in the *King*, so that his Patentee had a proper Remedy at Law to recover that Right; yet there being a just occasion to come into this Court, (as there was in

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regard

regard that the Lord *Clare* was the Patentee in Trust for the Plaintiff) when the Court by that means is possessed of the Cause, and the Right fully examined to here, the Court will not after that send the Plaintiff to Law. This Court never decreed a Suit, when it might decree a Remedy, as in the case of a Devise of Land, or where a Bond is taken in Trust and the Trustee refuses to let his Name be made use of, the Court will decree the Duty, and not an Action to be brought in the Trustee's Name. And the Defendant *Eustace* cannot in reason oppose a Decree; for if the Estate in Law be in him, he confesses it to be only a Trust; and if it be not in him, he cannot be prejudiced; for he disclaims to have any Interest: and the Judges in *Ireland* having held, that the Plaintiff could not recover at Law, because the Estate in Law was not in the King's Patentee; and the Court of Equity in *Ireland* having refused to Decree for the Plaintiff, because they were of another Opinion, and thought the Plaintiff had a proper Remedy at Law; it would be hard for this Court, when they were satisfied the Plaintiff had a plain Right, to send him to Law. And as to the Objection that it could not properly be tryed here, whether the *Fitzgerrald* that is the *cestuy que trust*, was the same Person with the *Fitzgerrald* that Forfeited, there was little Reason in that Objection. In the Case of *Barnewell* and *Rochford*, *Rolls Abridgment* fol. 597. a Tryal was directed touching a Feoffment of Lands in *Ireland*; which certainly was much more Local than the Point in Question.

Lord Chief Baron *Atkins* upon reading the second Act of Settlement was of Opinion, that the Estate in Law absolutely Vested in the King, and not that the Trust only Vested; but yet notwithstanding thought the Plaintiff might have a proper Case in Equity, in case a plain Right appeared for him: But he now doubted, whether this Court would direct a Tryal, whether the *Fitzgerrald* that was the Nocent or Forfeiting Person, and the *Fitzgerrald* that was the *cestuy que trust*, was one and the same Person.

Master of the *Rolls*, as to the vesting Point, thought the Acts of Settlement were not like the Statute of *Hen. 8. &c.* and that this Case differed from the Lord *Sheffield's* Case and *Dowdale's* Case, for there the Vesting is for the King's Use, but by the Act of Settlement the King was to take nothing to his own Use, but was in the nature of a Trustee, tho' contrary to the general received Opinion, that the King can't be a Trustee: but in the main he was of Opinion that the Trust only Vested. And as to the Question whether the Person that Forfeited and the *cestuy que trust* was one and the same Person, he thought the Evidence was full and plain, that it was the same Person. In *Forty two* he was Out-lawed by the name of *Fitzgerrald* of *Christian Town*; the Lease in Trust was made by *Fitzgerrald* of *Lady Town*; and the Inquisition found that *Fitzgerrald* of *Christian Town* was afterwards of *Lady Town*: but in case the Court doubted of that Matter, he thought this Court might well direct a Tryal at Law.

Lord Chancellor was satisfied, upon perusal of the Act, that the Estate in Law vested in the *King*; but that the Plaintiff might notwithstanding be proper for a Decree; and took it, that this Court might very well direct a Tryal, whether the Person that Forfeited and the *cestuy que trust* was one and the same Person; and cited Sir *William Tyrtingham's* Case, who being so powerful that Right could not be had against him in the County of *Bucks*, the *Venue* was changed upon a Bill brought here purely for that purpose: and he took the Point in this Case rather to be, whether there was ground for him to doubt whether it was the same Person; and therefore declared, in case the Defendant would not consent to try that Matter here, he would Decree it without more ado: and thereupon a Tryal was directed by Consent to be had in the County of *Salop*: But with this at the Instance of the *Chief Baron*, that in case the Verdict went for the Plaintiff, it should be without Costs, but if against him he should pay Costs.

Venue changed upon a Bill brought in this Court for that purpose only.

Carpenter versus Carpenter.

Wasborne versus Downes.

Case 412.

23 Februar.

In Court,
Lord Chancellor.

Common Recovery suffered or a Fine levied by *cestuy que* trust of an Estate Tail has the same effect in Equity, as it would have at Law, in case the Legal Estate was in him.

IN these Cases it was Resolved, that where a common Recovery is suffered or a Fine levied by *cestuy que* trust in Tail, it shall have the same effect, and avail as much in this Court, and bind the Trust in the same manner as the same would the Estate in Law, in case he had the Legal Estate in him: and as to a Fine, it had never been doubted since the Case in the Lord *Bridgman's* time. And it has been held by some, that even a Bargain and Sale enrolled by *cestuy que* trust of an Estate Tail should bind the Issue, in regard that such a Trust is not within the Statute *de Donis*.

A on his Marriage agrees to settle Lands for the Benefit of his Wife and their Issue, and afterwards alien part of those Lands.

Jointress decreed to have the deficiency of her Jointure made good out of the Inheritance of the Lands remaining unfold.

But that Decree was Reversed.

Where the Jointress and the Issue claim by the same Settlement, they shall contribute proportionably in the discharge of any Prior Incumbrance on the Estate.

And in the Case of *Carpenter* and *Carpenter*, the Husband upon his Marriage had agreed and given Bond to settle particular Lands to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Issue of that Marriage in Tail; and the Husband having afterwards aliened and sold part of these Lands, the Wife had obtained a Decree in the Lord *Nottingham's* time to have the full Value of the Estate she was to have for her Life, supplied and made good to her out of the Lands remaining unfold, and that the Inheritance of those Lands should be subjected thereunto: Now upon a Rehearing the Lord Chancellor Reversed that part of the Decree, for the Jointress and Children are equally Purchasors; and the Wife must not have all and leave nothing for the Children, but they must bear the Loss in proportion; and so in any Case where the Issue and Jointress claim by the same Settlement, if there be a Prior Incumbrance, the Jointress shall contribute and bear her Proportion, and not hold over and lay the whole Burthen upon the Heir.

Pitt

Pitt versus Earl of Arglash.

Cafe 413.
24 Februar.

In Court,
Lord Chancellor.

THE Plaintiff having brought a Bill of Review to reverse the Decree obtained by the Defendant, the Defendant demurred thereunto; and the Plaintiff being satisfied that the Opinion of the Court would be against him, moved, that he might dismiss his Bill, and obtained leave to make the Motion when the Demurrer came to be argued; and now moved accordingly: But the Court denied the Motion, and allowed the Demurrer: and so the Plaintiff was caught, who designed only Delay; but was now barred from bringing any new Bill of Review. At Law after Errors assigned the Court will not give leave to discontinue a Writ of Error.

A Man can't bring a new Bill of Review after a Demurrer allowed to a former Bill of Review.

Ante Cafe 124.
126.

Trinity College in Cambridge versus Browne.

Cafe 414.
Eodem die.

In Court,
Lord Chancellor.

THE Bill was to discover the best Beast of *cestuy que trust* of a College Lease: The Defendant demurred, for that the best Beast of the *cestuy que trust* could not be taken for a Herriot; and it also appeared of the Plaintiff's own shewing that the Tenants, who had the Estate in Law in them, were yet living. The Demurrer was allowed.

An Herriot is not due upon the Death of *cestuy que trust*, but of him that has the Legal Estate.

Parry versus Rogers.

Cafe 415.
Eodem die.

In Court,
Lord Chancellor.

THE Bill was to examine Witnesses, to preserve their Testimony touching the Title of certain Lands in the Bill mentioned. The Defendant demurred, because there was no Impediment that hindred the Plaintiff from trying his Right at Law; and that he had not obtained any Verdict in Affirmation of his pretended Title. Demurrer allowed.

A Man cannot bring a Bill to examine Witnesses in *perpetuam rei Memoriam* to establish his Title, until he has made it good by a Verdict at Law; if he is under no Impediment of trying his Title at Law.

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Lecore

Lecone versus Sheires.

Cafe 416.
Eodem die.

In Court
Lord Chancellor.

A indebted to
B, by Deed
grants the
Guardianship
of his Child
to A, and co-
venants not to
revoke it, and
dies. Equity
will not set a-
side the Deed
unless the Debt
be paid, or the
Trust abused.

THE Father of the Plaintiff the Infant being indebted to the Defendant, by Deed granted him the Guardianship of his Children, with a Covenant not to revoke the Deed, and gave a Bond of 500 l. Penalty to perform Covenants. The Bill was to bring the Guardian to an Account, and to remove him: And tho' the Guardian being present in Court produced the Deed, and was ready to deliver up the same, in case the Court should so order or direct; Yet in regard there was a just Debt owing to the Defendant from the Father of the Infant, the Court declared they would not restrain the Guardian from receiving the Rents and Profits of the Infant's Estate, but only from abusing his Person.

Note, The Statute is, that the Father may by Deed grant the Guardianship of his Children from time to time. *Vid.* Stat' 12. Car' 2. Cap. 24. Sect. 8.

Cafe 417.

Eodem die.

In Court
Lord Chancellor.

The Defendant
pleaded him-
self Heir on
the Part of the
Mother, and
did not say
he was Heir
of the whole
Blood.
Plea over-ruled

Addison versus Hindmarsh.

THE Bill was to be relieved touching certain Lands which the Plaintiff claimed Title to, as Heir on the Part of his Father. The Defendant pleaded that the Mother was the Purchaser of those Lands, and that the Defendant was Heir on the Part of the Mother; but it not being pleaded, that the Defendant was Heir of the whole Blood to the Mother, (and in Fact he was only of the half Blood to the Mother) for that reason the Plea was over-ruled.

Upon a Bill
of Appeal
from an Infe-
rior Court you
need not assign
particular Er-

Note, In a Bill by way of Appeal from an Inferior Court, the Plaintiff therein must complain of the Injustice done him by the Inferior Court; but is not obli-

ged to assign any Particular Errors; which is the difference betwixt a Bill of Appeal and a Bill of Review: But in this they agree, *viz.* that both must be upon the same Evidence; and you cannot examine *de novo*; tho' in the Spiritual Courts they examine over and over again, and proceed upon new Allegations.

rors, as you must do upon a Bill of Review.

But you can't examine *de novo* upon either of those Bills.

Tho' in the Spiritual Court they examine over and over again upon new Allegations.

And the Lord Chancellor seemed to incline that a Bill of Appeal would lye from an Inferior Court to the Court of Chancery, as at common Law the King's Bench corrects all inferior Courts.

Note that from the Court of Equity at Lancaster, an Appeal by Act of Parliament lies to the Dutchy Court.

An Appeal lies to the Dutchy Court from the Court of Equity at Lancaster.

Englefeild versus Englefeild.

Cafe 418.

1 Martij.

In Court

Lord Chancellor.

SIR Thomas Englefeild, the Plaintiff's Father, was seized of an Estate for his Life in the Reversion of two Estates, the one in Leicestershire, and the other in Wiltshire, each of about the Value of 1800*l.* *per Ann.* expectant upon the death of two Jointresses, Remainder to his first and other Sons in Tail, Remainder in like manner to his next Brother the now Defendant; and tho' he was thus intitled to the Reversion of these great Estates expectant on the death of the Jointresses, (Sir Robert Howard's Lady having all the Wiltshire Estate in Jointure, and Dame---- Englefeild all the Leicestershire Estate in Jointure to her) yet he had little or nothing in present, and had been some time in Prison for Debt; and having formerly been married, but never had any Issue, and being sixty Years old, and not intending to marry again, the Wiltshire Estate was sold to Sir Robert Howard, and out of the Purchase Money 2500*l.* was paid to the Defendant for his Interest therein. And the now Defendant agreed with Sir Thomas Englefeild, his elder Brother, to pay him down in hand 600*l.* and to pay him 500*l.* *per Ann.* during his Life,

If a contingent Remainder is destroyed by a Legal Conveyance, and that Conveyance is obtained by Fraud, Equity will relieve against it.

Post Cafe 419.

Life, to commence from the Death of the Lady *Englefield* the Jointress, whose Estate the Defendant also bought in (for without her, the Plaintiff's Father having barely an Estate for Life expectant on her Death, he could not make a good Tenant to the Precipe) and after several Treaties had, at last a Final Agreement is made (wherein Sir *Jeffery Palmer* was consulted) between the two Brothers upon the Terms aforesaid, and Lady *Englefield's* Estate being bought in, a common Recovery was suffered, and Fines levied, and the Defendant was in actual Possession of the Estate. After this Sir *Thomas* marries a young Wife, and by her in his old Age has Issue the now Plaintiff, and then brought a Bill in the Lord Keeper *Bridgeman's* time to be relieved against this Agreement, and the Conveyances made pursuant thereunto; thereby suggesting, that he was defrauded and circumvented; which Bill was to the same effect with the Plaintiff's now Bill: and upon a solemn Hearing that Bill was dismissed.

And for the Defendant it was now strongly insisted, that altho' the Plaintiff comes in as a Remainder-Man, so that in strictness a Dismission of the Plaintiff's Father's Bill is not pleadable in barr to the now Plaintiff's Bill; yet certainly, if there were not ground to relieve the Father, the now Plaintiff cannot be relieved upon any Pretence of Fraud, which was personal: and if any Fraud was done to any one, it was to the Father, and not to the Plaintiff; who was not then in being; nor was his Estate of any Consideration in the Law; but was purely contingent, and well and sufficiently destroyed by the common Recovery before the Plaintiff was born. That the Contract and Agreement was made by the Consent of all the Friends and Relations, and with great deliberation; Sir *Jeffery Palmer* having been all along consulted in it, and done by his Advice, and was reasonable and natural; Sir *Thomas* being then *Sixty* Years of Age, never having had any Child, tho' formerly married, and then a Widower, and wanted a present Subsistence. That the Badges of Fraud assigned by the Plain-

Plaintiff, received, as they thought, a clear Answer, and were in Issue in the former Cause; and now after *twenty* Years Enjoyment under this Agreement and Purchase, it was insisted, there was little Ground for the Plaintiff to destroy it upon pretence of Fraud, when the Fraud, if any, was in relation to the Plaintiff's Father only, whose Bill was dismissed; and the Plaintiff's Contingent Estate well and sufficiently destroyed by a legal Conveyance: and his Father might, if he had pleased, have given this Estate to his Brother, and the Plaintiff could never have avoided it.

The Court was of Opinion, upon the reading of the Articles, that this Conveyance was obtained by Fraud: and as to the Objection that the Plaintiff's Estate was contingent and absolutely destroyed by a legal Conveyance, that would not be material; for if the Conveyance was obtained by Fraud, it was the same in Equity, as if no Conveyance had ever been made; and therefore declared they would decree it for the Plaintiff, unless better Cause was shewn.

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Termino Paschæ,

3 Jacobi II. 1687.

IN CURIA CANCELLARIÆ.

Englefeild versus Englefeild

Case 419.

6 Aprilis.

In Court,
Lord Chancellor.

Ante Case 418.

THIS Cause standing this Day again in the Paper, the Defendant's Council applyed themselves principally to Answer the Objections made in relation to the pretended Badges of Fraud, and observed that whether Sir *Thomas* the now Plaintiff's Father was barely Tenant for Life without any Remainder to his Issue, or whether there was a Remainder to his first and other Sons in Tail, depended only on the Re-publication of a Will, which was in the Power of Sir *Robert Howard* to make it a Will or no Will; and the Title was thought so doubtful, that the Point upon the Re-publication was afterwards tryed at the Bar; but that Sir *Thomas* was fully informed and apprized of his Estate by the Will, such as it was; and it is fully proved in the Cause, that the first Agreement, which was 18 Decembris, was for 600*l.* and 200*l.* per Ann. and it was then so far from being apprehended, that the Defendant had any extraordinary Bargain of it, the Plaintiff's Father being then above 60 Years of Age, and not like to have Issue, that he reserved a Latitude to go off; and

and then *Smith* finding the Defendant so indifferent in this matter, comes in, first for a Third, and then for a Moiety. After all this they come to a new Agreement; the 200*l.* is paid, and there are Covenants for further Assurance, and new Deeds executed, and after all this a Release given. And as to the Objection, that the Consideration of the subsequent Articles of the *twenty first* of *September* was mentioned to be, amongst other things, that the Defendant released his Pretensions to the *Wiltshire* Estate, it appeared that they were in time subsequent to the Articles of the *twenty first* of *September*.

As to that it was answered, that the Articles of the *twenty first* of *September* were antedated, that they might over-reach *Smith*, and cut him out of his Moiety; but were not in Fact executed, as fully appeared in the Cause, till after that the Defendant had released his Pretensions to the *Wiltshire* Estate; and that the Dismissal of the Plaintiff's Father's Bill, was there nothing else in the Cause, answers all those matters. And it was observed that the Plaintiff had very little Ground to stand upon, and a very slender, if any, Foundation to raise an Equity upon; for as to an Estate in Law, he had none, no not so much as a Right; there was never any thing more than a Contingency limited to him, and that fully destroyed by a legal Conveyance before he was born; and yet in respect of that alone it is, that he would be now relieved upon a supposed Fraud done in the obtaining a Conveyance in prejudice of this imaginary Estate of his, when his Father that had a real Estate could not be relieved: and it was insisted, that a Dismissal upon hearing of the Merits of a Cause was as pleadable as a Decree; and the Plea in this Case was disallowed barely upon the Account, that the Plaintiff did not come in under his Father's Title, but as a Remainder Man. In the Case of *Roscarrocke* and *Barton*, Tenant for Life with a Remainder to another in Tail was foreclosed; and after *Sixteen* Years time the Remainder-Man came to redeem, but was dismissed; for otherwise
there

there would be no end of Suits: as in this Case, if Sir *Thomas* had seven Sons, they would have all had several new springing Equities. But the Court varied not in Opinion, and therefore decreed a Reconveyance and an Account of Profits.

Holford versus Burnell.

Case 420.

18 Aprilis.

In Court,
Master of the
Rolls.

A Defendant
held to the Of-
fer in his An-
swer, that the
Circumstances
of the Case
were varied
from what
they were at
the time when
the Answer
was put in.

THE Plaintiff's Bill was, that the Defendant might redeem or be foreclosed. The Defendant by Answer confessed the Plaintiff's Mortgage, and that he (the Defendant) having the Equity of Redemption assigned to him, the better to secure a Debt owing to him by the Mortgagor, offered to pay the Plaintiff what was due on his Mortgage. This Cause rested thus for some time; and afterwards the Mortgagor being absconded, a Bill was brought by several of his Creditors against the Plaintiff Mr. *Holford* and others, and in that Case it appeared that the Lands mortgaged to Mr. *Holford* were subject to a Mortgage prior to his, and that the Mortgagor had made a Deed of Trust of those Lands amongst others for Payment of his Debts; and upon hearing of that Cause it was decreed that the now Plaintiff should be only paid in Proportion with the other Creditors; and not liking that Decree he brought this Cause to hearing on Bill and Answer; and in regard the Lands by the Deed of Trust were subjected to the Payment of more Debts than the same were worth to be sold, the Defendant would now go back from the Offer in his Answer, and be contented to be foreclosed.

And it was strongly insisted for the Defendant, that he ought not to be so bound by this Offer in his Answer; but that he might notwithstanding wave it; he being content to be foreclosed; and the rather for that since the Answer put in, the Original Cause was heard, and decreed that the now Plaintiff should be paid but in Proportion with the other Creditors; and now by bringing on

on the Cross Cause upon Bill and Answer, the Plaintiff would vary the Decree made in the Original Cause; and that the Circumstances of the Case were now much altered and varied, from what they appeared to be in the Cross Bill, and from what was known at the time of the Answer put in: and the Plaintiff could not have a Decree beyond his own Bill, which was only that the Defendant might redeem or be foreclosed: But notwithstanding this the *Master* of the *Rolls* held the Defendant to the Offer in his Answer, and decreed him to pay the Money due to the Plaintiff.

Dorrington versus Jackson and Watson.

Cafe 421.

Eodem die.

In Court
Lord Chancellor.

HIND and his Wife, who was the Widow and Administratrix of *Colvile*, being possessed for Years of a Messuage called the *three Tunns* in *Lombard Street*; the fore Part by Lease from Sir *Christopher Buckle* under a Ground Rent of *ten pounds per Ann.* and the back Part by Lease from the Defendant *Jackson* at a Ground Rent of *5 l. per Ann.* the Plaintiff *Dorrington* brings an Action against them at Law for a Debt owing by the Intestate *Colvile*; whereunto they appeared; and *Hind* becoming a Bankrupt, and he and his Wife absconding, the Plaintiff obtains Judgment against them at Law by Default, and upon a *venditioni exponas* has these Terms for Years sold unto him by the Sheriff: But pending that Proceeding at Law, *Buckle* and *Jackson*, the Head Landlords, entered for Non-Payment of Ground Rent, and obtained several Judgments in Ejectment. *Dorrington* agrees with *Buckle* and pays him his Rent in arrear, with his Costs and Charges at Law, and accepts a new Lease of him for the Residue of the Term then to come; and by a Writ of Possession upon the Judgment recovered by *Buckle* is put into Possession of the fore Part of the Messuage; and having thus *Buckle's* Interest, he apprehended that *Jackson* could not dispose or make any Benefit of his back Part of the Messuage, and therefore refused to agree with him on the same Terms as he had with *Buckle*, and in-

A recovers

Judgment a-

gainst *B*, and

has a Lease

sold to him by

the Sheriff;

C the Ground

Landlord en-

ters, and ha-

ving Judg-

ment in Eject-

ment for Non

Payment of the

Ground Rent,

offers *A* upon

Payment of

Arrears of

Rent and Costs

at Law to

make him a

new Lease for

the Remainder

of the Term. *A*

refusing this

Offer, *C* lets it

to another. *A*

brings his Bill

to be relieved a-

gainst the Re-

covery and For-

feiture at Law,

having first

tendered the

Arrears and

Costs.

Bill dismissed

with Costs.

Y y y y

fisted

sifted to have Abatements of the Ground Rent in Arrear, &c. and pretended that the Back House would be of little Use to him, and that he was very indifferent whether he had it at the Ground Rent or not: *Jackson* hereupon agrees with the other Defendant *Watson*, who was Tenant to *Jackson* of a Messuage in *Cornhill* which adjoined to the back part of the *three Tunns*, (the Ground on which that back Part was built having formerly belonged to this Messuage,) to lay this back Part of the *three Tunns* to the Messuage in *Cornhill*, and for that Purpose they beat down a Wall and make a Door into the back Part of this Messuage, and by nailing up the Doors divide it from the fore House. *Dorrington* being thus disappointed of bringing *Jackson* to his own Terms indicts him and *Watson* for a forceable Entry; but they were acquitted, and having tried (but without Success) other means at Law to get the Possession of this back House, at last tenders the Ground Rent in Arrear and the Costs and Charges at Law, and upon Refusal of that brings his Bill to be relieved against the Re-entry and Forfeiture at Law.

Upon the hearing of the Cause the Case appearing to be *ut supra*, and it being fully proved in the Case that *Jackson* had offered the Plaintiff to accept of the same Terms as Sir *Christopher Buckle* had agreed to, and that the Plaintiff refused to comply with that Offer, and would not pay all the Ground Rent in Arrear with the Defendant's Costs and Charges at Law; and that before the Bill brought *Jackson* had actually let this back Part to *Watson*, who had been at a considerable Charge in the fitting this back House for his Conveniency, the Court would not therefore now relieve the Plaintiff, but dismissed his Bill with Costs to be ascertained by the Defendant's own Oath.

This Cause was afterwards reheard, and the former Decree confirmed *in Omnibus*.

Tooke versus Sir Robert Atkins & al.

Case 422.

19 Aprilis.

In Court

Lord Chancellor.

THE Plaintiff's Mother being very intimate with the Defendant *Sir Robert Atkins*, and designing to make an Advantage by the Marriage of the Plaintiff her Son, who was Heir to a good Estate, an Agreement was made between the Plaintiff's Mother and *Sir Richard Atkins*, whose Daughter the Plaintiff married, that *Sir Richard* should pay 2000*l.* for the Use and Benefit of the Plaintiff's Mother, and nothing of a Portion was paid or intended for the Plaintiff; and 1800*l.* of this Money having come to the Hands of the Defendant *Sir Robert Atkins*, a Trustee for Mrs. *Tooke*, unto whom or for whose Use the Defendant *Sir Robert* had long since paid the same; the Plaintiff's Bill was to have this Money answered and made good to him, he having no other Portion with his Wife.

The Defendants by Answer insisted that this Money was intended for the Use and Benefit of the Mother, and not for the Plaintiff, and the Writings seemed to import as much; and the Defendant's Council insisted on the Case of *Greysly* and *Lothor* in *Hob. fo. 10.* where it is adjudged to be a sufficient Consideration to maintain an Action that the Mother would give her Consent to the Marriage of her Child: But *Sir Richard Atkins* being examined in the Cause, and in effect deposing that this Money was intended as a Portion with his Daughter, the Lord Chancellor decreed for the Plaintiff, and that in the first place the Mother should pay as far as she was responsible, and *Sir Robert Atkins* the Residue; but both to be liable to satisfy the Monies to the Plaintiff.

Glover versus Faulkner.

Case 423.

25 Aprilis.

In Court

Lord Chancellor.

Altho' it is an Order of Courſe to examine a Defendant *de bene eſſe* ſaving juſt Exceptions, yet when the Cauſe is heard and it appears ſuch Defendant is a party intereſted, it is proper to ſhew Cauſe againſt ſuch an Order before the Witneſſes be examined.

THIS Cauſe having been heard and referred to an Account, the Plaintiff afterwards moved to examine two of the Defendants *de bene eſſe*, which was ordered, unleſs Cauſe. The Defendant's Council coming this Day to ſhew Cauſe, took this Difference, that altho' it was an Order of Courſe to examine a Defendant *de bene eſſe*, ſaving juſt Exceptions; yet when the Cauſe was open, and it appeared that the Defendants were Parties intereſted, it was proper to ſhew Cauſe againſt ſuch an Order before the Witneſſes were examined; which Difference was allowed to be well taken: but it appearing that Releaſes were given to the Defendants, and the Matter to be examined to being only matter of Account, the Cauſe was diſallowed.

Case 425.

26 Aprilis.

In Court

Lord Chancellor.

Wardour & Ux' verſus Berisford & Ux'.

An Account touching a Perſonal Eſtate being decreed, the Defendant endeavoured to charge the Plaintiff with a great Debt due to the Eſtate; but Defendant having opened a Bundle of Papers relating to that Demand, which had been ſealed up, and left in his Hands, the Defendant's Demand was for that Reaſon diſallowed.

THE Plaintiff and Defendant having married two Daughters of *I S*, upon his Decease there were ſome looſe Papers, that concerned the Account between the Plaintiff and his Father-in-Law, put up together in a Bundle, and covered with a Paper tied up with a Tape, and ſealed by two Perſons then preſent, and delivered to the Defendant *Berisford* to be ſafely kept, being then told they were Matters of Concern: And there being now an Account directed of the Eſtate of *I S*, which was to be equally diſtributed between the Plaintiff and Defendant, the Defendant demanded as due from the Plaintiff to his Father-in-Law for Diet, &c. 2300*l*. But upon Proof made that the Defendant had altered the Bundle of Papers ſo ſealed up, and diſplaced them, and that it could not be known what Papers might have been taken out, and the Maſter having reported that the Defendant had ſup-

suppressed the Evidences, the Court for that Reason disallowed the Defendant's whole Demand against the Plaintiff, tho' the Defendant swore he had produced all the Papers, and tho' the Papers produced appeared to be half-yearly Accounts, and related one to the other, and not one missing, but the Account was thereby carried down within a little time before the Testator's Decease; and tho' the Lord Chancellor declared himself satisfied that all the Papers were produced, yet for the Reason aforesaid wholly disallowed the said Demand.

Noel versus Robinson.

BY the Defendant's Council it was insisted, that by the Custom of the Island of *Barbadoes* a Plantation there, tho' it be a Fee Simple Estate, is in the first Place liable to the Payment of Debts; so that the Owner cannot by his Will so devise his Plantation, but that the same will be liable to the Payment of his Debts: But these Debts must be either Debts contracted on the Place, or Debts contracted in *England* or elsewhere for matters relating to the Plantation, &c.

And Mr. Serjeant *Maynard's* Case was cited, who recovered a Debt contracted here against the Executor of an Owner of a Plantation in *Barbadoes*, and by his Advice an Action of *Trover* was brought, and Judgment obtained for the fourth Part of a Negroe.

But the principal Point intended was, whether the Defendant *Robinson*, who was the Executor of Sir *Martin Noell*, who had devised this Plantation to his Children, having made a Lease of this Plantation reserving the Rent to himself, but had therein declared that the same was in Trust for the Children of Sir *Martin Noell*, who were the Legatees, was such an Assent to a Legacy, as should be binding to the Executor, so as that he should not have Relief against the same, as to Debts by him afterwards paid.

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And

Case 426.

30 Aprilis.

Lord Chancellor.

Ante Case 80.

Post Case 436.

453.

2 Ch. Rep. 145.

2 Vent. 353.

And it was insisted for the Defendant, that such an Assent to a Legacy is no ways binding, as to a Creditor, the thing it self remaining in Specie; but in case the Plantation had been afterwards sold, it might have been otherwise. And then as it would not bind the Creditors, so it would not in Equity be binding to the Executor himself, as to such Debts as were by him afterwards paid; for as to those Debts he stood in the Place of the Creditors, and had their Equity; and the Case of *Huttoft Grove* versus *Banfon* and his Wife and *Thomas Grove*, decreed the *fourteenth* of December 1669, was cited, where one *Huttoft* by his Will devised 5000*l.* to the Plaintiff, and *five hundred Pounds* to the Plaintiff's Sister, (who afterwards married *Banfon*) and made Defendant *Thomas Grove* his Executor; and upon the Treaty of that Marriage the Executor agrees that there was 500*l.* and Interest due for the Legacy, and that he would make that up 1000*l.* and enters into a Statute for Payment, and also assigns the Equity of Redemption of a Mortgage for further Security, and dies, having much wasted the Testator's Estate, and without Assets sufficient to make Compensation. And the Plaintiff's Bill was, that *Banfon* might have his 500*l.* Legacy only in Proportion with him, and it was so decreed accordingly, and the Plaintiff was preferred as to the Redemption of the Mortgage, he having 5000*l.* Legacy, and the Defendant but 500*l.* And a like Case of *Nelthorpe* and *Biscoe*, where a Legatee had actually received her Legacy at the time it became payable, and the Estate afterwards by Casualty proving deficient to answer the other Legacies, which were not then payable, was made to refund: and the Case of *Chamberlain* and *Chamberlain*, decreed the 26th of July 1664, that an Assent to a Legacy shall not bar a Creditor, where the thing it self is remaining in Specie. And in the Case of *Catchmay* and *Nicholls*, where a Woman that had the Use of a Personal Estate devised to her for Life, with a Remainder over to another, had changed the Securities and taken new Bonds in her own Name, it was determined that *that* should not be construed to be

1 Ch. Rep. 148.

1 Ch. Rep. 135.

1 Ch. Rep. 256.

be a *devastavit*, or make her Estate any way liable; and that the Executor in that Case was but in the Nature of a Trustee, and was not to be punished, where the Devisee had acted fairly, and done nothing against good Conscience. And besides in the principal Case the Assent insisted upon is not properly speaking an Assent to a Legacy; for the Devise is of no less than the whole Inheritance.

Lord Chancellor. It is a Case of Consequence, and it will be fit therefore it should be well inquired into, how far a Plantation in *Barbadoes* is liable to the Payment of Debts: But as to the actual Assent to a Legacy by an Executor, *that* would not bind a Creditor. If an Executor should release a Debt of 100*l.* for *One Shilling*, *that* would not bind a Creditor: But in case there is no other Creditor, save only the Executor himself, there his Assent will be binding to him; as if an Executor will voluntarily release a Debt, he shall not be relieved against it, though a Creditor should.

Sagitary versus Hyde.

Case 427.

2 Maij.

In Court,
Lord Chancellor.

A Man makes a Settlement on one of his Co-Heirs, with a Power of Revocation; the Heir, either before Original filed or Bill brought, aliens; but before all the Purchase Money is paid, an Original is filed and a Bill brought, and Notice thereof is given to the Purchaser.

Per Cur'. There is a Difference between a Conveyance with a Power of Revocation, and a Conveyance to such Uses as a Man shall appoint, and he afterwards by Will appoints the Uses.

In the Principal Case there being a Debt owing to the King it was ordered that the King's Debt should be satisfied out of the Real Estate, that the other Creditors might be let in to have a satisfaction of their Debts out of the Personal Assets.

Scudemore

Case 428.

3 Maij.

Lord Chancellor.

Scudemore versus White.

THE Statute of *Limitations* is no Plea in Bar to an open Account.

Case 429.

Eodem die.

In Court,

Lord Chancellor.

Where one Obligee is sued, by the Custom of London his Co-Sureties shall contribute.

So by the Custom of London where a Surety pays a Debt, he shall maintain an Action against the Principal, tho' he has no Counter-Bond.

Case 430.

4 Maij.

Lord Chancellor.

A Feme Covert after the Death of her Husband bound by an Inclosure, to which he had agreed, it appearing that her Estate was much improved by the Inclosure, and that by disturbing it she aimed at an unreasonable Advantage to her self.

Case 431.

Eodem die.

In Court,

Lord Chancellor.

Relief denied against the Breach of a Condition in a Voluntary Settlement.

Layer versus Nelson.

WHERE one Obligee that is a Surety is sued alone, by the Custom of the City of London he shall make his Co-Sureties contribute: so where a Surety pays a Debt, and has no Counter-Bond, by the Custom of the City of London he shall maintain an Action against the Principal.

Rothwell versus Widdrington.

A Decree was made for an Inclosure 20 Years since, to which the Defendant the Lady *Widdrington's* Husband had agreed in his Life-time, and she having an Estate of about 25 l. per Ann. within the Manor, would now disturb the Inclosure: And tho' in strictness her Husband's Consent could not bind her Interest, yet it being proved in the Cause, that her Estate was much improved by the Inclosure, and that she designed only to make an unreasonable Advantage to her self: The Court decreed the Inclosure should stand.

Longdale versus Longdale.

THE Father makes a Voluntary Settlement upon his eldest Son in Tail Male, Remainder to a second Son, &c. in which is a Proviso, that if his eldest Son did not pay the second Son 600 l. at his Age of 21 Years, that then the Estate of the eldest Son both in Law and Equity should cease. The Father having afterwards married a second Wife, by Deed taking notice of the former Settlement, and that

that his Son had not paid the Money according to the Proviso, conveys the same Lands to the Use of his Children by his last Wife.

The Plaintiff's Bill was to be relieved against the Forfeiture for Non-payment at the precise Day: But in regard the Conveyance was purely Voluntary, and the Father might have put what Conditions or Restrictions upon his Son, he thought fit; and the Proviso being Special, that for Non-payment at the Day the Son's Estate both in Law and Equity should cease, the Court refus'd to relieve the Plaintiff, and dismissed the Bill; and the rather for that the Plaintiff had set up a Release against his Father, which was obtained by Surprize; and the Deed in Law was defective, and amounted only to a Declaration of Trust.

Eyles versus Cary.

Cafe 432.

6 Maij.

Lord Chancellor.

THE Cafe arose on a Will, wherein was this Clause, *viz.* *I Will all my Debts shall be paid before any of my Legacies or Gifts herein after mentioned;* and then devises several Pecuniary Legacies; and after in the same Will devises Lands to *J S*, on Condition to pay a certain Rent to *J N*; and other Lands to *J S*, on Condition to pay *5 l. per Ann.* to *J D*. The Question was whether these Lands were by the Will subjected to the Payment of the Testator's Debts, or only to the Payment of the particular Rents thereout devised.

Per Cur'. The Lands are not subjected to the Payment of the Testator's Debts; the general Clause in the beginning of the Will shall be intended only of the Personal Estate, and the Pecuniary Legacies thereout devised.

Surrey versus Smalley.

Cafe 433.

Eodem die.

Lord Chancellor.

A Judgment confessed by an Executor pending a Bill here shall not be allowed upon an Account of Assets.

A a a a a

Parker

A Judgment confessed pending a Bill here not allow'd in an Account of Assets.

Case 434.

7 Maij.

Lord Chancellor.

Copyholder in
Tail takes a
Conveyance of
the Freehold in
Fee. The Copy-
hold is Merged.

2 Chanc. r. 174.

Ante Case 364.

Parker versus Turner.

THE Question was, whether Tenant in Tail of a Copyhold having taken a Conveyance in his own Name of the Freehold in Fee, the Copyhold Estate was thereby Merged. The *Lord Chancellor* seemed to make little doubt but that the Copyhold was Merged, tho' it was said this Point was depending upon a Special Verdict at Law.

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D E

Term. S. Trinitatis,

3 Jacobi II. 1687.

IN CURIA CANCELLARIÆ.

Selfe versus Madox & al'.

Case 435.

26 Maij.

In Court,
Lord Chancellor.

THE Defendant *Madox* was decreed to pay the Plaintiff a Sum of Mony, or deliver up Possession of a House and Lands in *Edmonton*; and upon the Defendant's Examination on Interrogatories touching a Contempt in not performing the Decree, it came out that the Defendant had made an Assignment to a real Creditor by Bond of this House and Lands for satisfaction of his Debt, and that this Assignment was made by *Madox* of his own free Will, without the Privy or Knowledge of the Creditor, not only pending the Suit, but even after the time first set for Payment of the Money or delivering of the Possession was expired, which Time *Madox* had got enlarged on Motion, with design in the mean time to make this Conveyance.

A being decreed to pay a Sum of Mony, or deliver Possession of a House to B by a certain Day, conveys the House to a Creditor in satisfaction of a real Debt. This shall not defeat B of the Benefit of the Decree.

The Question was, whether this Assignment made by *Madox* should defeat the Plaintiff of the Benefit of the Decree.

The Court decreed the Possession of the House and Lands to be delivered to the Plaintiff, without any regard had to this Conveyance; and the Case of *Goldson* and *Gardiner*

Gardiner in 1680, was cited, where the Court had made the like Decree in the case of a Conveyance made from the Father to the Son, Prior to the Decree, but pending the Suit.

Case 436.

Eodem die.

Lord Chancellor:

Ante Case 80.

426.

Post Case 453.

Noell versus Robinson.

How a Plantation in *Barbadoes* may be made liable to a Debt contracted in *England*.

THIS Cause coming on this Day again for his Lordship's Opinion, he inclined to Decree it for the Plaintiff; and declared that where an Executor has assented to a Legacy, he shall never afterwards avoid it, tho' a Creditor in such Case may make the Legatee refund: and as touching the making a Plantation in *Barbadoes* liable to a Debt contracted here, it was said, the Method was by a Procuration from hence under the Seal of the Mayor of *London*, and getting that Recorded there; or an Acknowledgment of the Debt by the Owner of the Plantation upon the Place will do it.

Case 437.

30 Maij.

Lord Chancellor.

A an Attorney takes B as his Clerk, and receives 120*l*. and by Articles agrees with the Father of B to return 60*l*. of the Money, if he died within a Year: A died within 3 Weeks.

The Executor of A decreed to pay back 100 Guineas.

Newton versus Rowse.

THE Defendant was Executor of one *Child* an Attorney, with whom, when he lay ill of the Sickness whereof he afterwards died, the Plaintiff placed his Son, and gave 120*l*. with him; and Articles were made and Executed, by which it was provided, that in case *Child* died within one Year, that then 60*l*. of the Money should be returned. It happened that *Child* never recovered, but died within three Weeks after sealing of the Articles, and Payment of the Money: and the Bill now was to have a greater Sum than 60*l*. paid back.

The Court, notwithstanding the Parties themselves had provided against Accidents, and agreed for a certain Sum, to wit, 60*l*. to be returned, in case *Child* died within a Twelve-month, and that *modus & conventio vincunt legem*, yet decreed 100 Guineas to be paid back to the Plaintiff the Father.

Sir

Sir Humphry Mackworth's Case.

Case 438.

2 Junij.

Lord Chancellor.
A Petition to the King, to direct his Judges to take a Fine or Recovery from an Infant, referred to the Lord Chancellor.

SIR *Humphry Mackworth* having married an Heiress, Petitioned the King, that his Majesty would be pleased by Privy-Seal to direct his Justices of *England* and *Wales* to take a Fine or Common Recovery, as there should be occasion, from his Wife, notwithstanding her Minority, she being now *eighteen* Years of Age, in order to the settling of her Estate to the Uses therein mentioned; so that the Petitioner might be sure, tho' his Wife should die (who was now big with Child) of an Estate for Life in the Premises.

The King in Answer to the Petition signified, that he was satisfied with Sir *Humphry's* Merit, and was graciously disposed to gratify him in this Matter; but however referred it to the *Lord Chancellor* to report what was fitting to be done therein: and now upon hearing Council on both Sides, one Mr. *Evans*, who had married the young Lady's Mother, opposed the Petition; but the *Lord Chancellor* declared, he thought the Petition reasonable, and that he would report the same to the King accordingly.

Note, Tho' the Petition pray'd, that the Justices might be directed to take a Fine or Common Recovery, Mr. Serjeant *Maynard* observed, that the Petition was inartificially drawn in that Matter, for that a Fine could not be taken from an Infant; nor was it ever done: but that a Common Recovery might be had, as desired, by the King's Special Direction.

A Fine cannot be taken from an Infant, but a Recovery may, by the King's Special Direction.

Heyward versus Rogers.

Case 439.

4 Junij.

In Court,
Lord Chancellor.

ONE *Prudence Goodwin* being possessed of a Term for Years settled the same in Trust for her self for Life, Remainder to one *Rebecca Hurst* for Life, and from and

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after
A Term was limited to A for Life, then to B for Life, then to such

Child as B should leave at his Death, and for want of such Child to C. Q. If the Remainder to C is good.

after the Death of *Rebecca*, to permit and suffer such Child or Children, as *Rebecca* should have at her Death, to receive and take the Profits thereof; and for want of such Child or Children, then in Trust for the Plaintiff. *Rebecca* had Issue a Son, who died in her Life-time without Issue.

The Question now was between the Plaintiff Remainderman, and the Defendant, who was Administrator, as well to *Rebecca*, as to the Child.

It was objected, that the Remainder to the Plaintiff of the Term in Question was void, being to take Place after two Lives then in being, and the Death of such Child or Children as *Rebecca* should have, who were not then in being; to which it was answered, that all this was to happen and was circumscribed to the Life of *Rebecca* (to wit) in case she died leaving no Issue: and the Case of *Oakes* and *Chafford* was cited, and it was said, that if this Child had lived to contract Debts, or wanted a Maintenance, it would be hard that his Administrator should not have the Benefit of this Term: Or suppose the Son of *Rebecca*, tho' he died in the Life-time of *Rebecca*, had left a Son, it would be hard to carry this Term from the Child to the Remainder-man.

Case 410.

Eodem die.

In Court,

Lord Chancellor.

Devise of a Portion to a Child with Interest, but not to be paid to the Child till 21. Child dies

21. Portion shall go to the Administrator of the Child.

Collins versus Metcalfe.

A Portion devised to a Child with Interest, but not to be paid or payable until the Child attain *twenty one* Years or was married: the Child dies under *twenty one* and unmarried: decreed the Portion to the Administrator.

Spencer versus Wray.

ADjudged, that where the Suit abates, the Plaintiff may either bring an Original Bill, or a Bill of Revivor, at his Election.

Case 441.

7 Junij.

In Court,
Lord Chancellor.

Where a Suit abates, Plaintiff may bring an Original Bill, or Bill of Revivor, at his Election.

Hester versus Weston.

WHERE a Man demurs, for that the Bill contains several Matters not relating one to the other, and in some whereof the Defendant is not concerned; if by Answer Defendant doth more than barely deny Combination and Confederacy, he over-rules his Demurrer.

Case 442.

Eodem die.

If a Defendant demurs, because the Bill contains distinct Matters against several Defendants, and answers further than denying Combination, he over-rules his Demurrer.

Meredeth versus Jones.

BY Articles on the Marriage of the Plaintiff, the Plaintiff's Father was to pay 50 l. as a Portion with his Daughter, and the intended Husband in Consideration thereof was to make a Settlement. The Marriage was had; but before the Money was paid, or Settlement made, the Plaintiff's Husband died intestate, and she takes out Administration, and thereby becomes intitled to the 50 l. And now brings her Bill against the Heir of her Husband, for to have her Jointure according to the Marriage-Articles.

Case 443.

8 Junij.

In Court,
Lord Chancellor.

A, in Consideration of a Portion, articles to settle a Jointure, and dies before the Portion paid, or Settlement made. The Wife takes Administration, and so becomes intitled to the Money, and then brings a Bill against the Heir of the Husband to have her Jointure settled.

Per Cur'. The Plaintiff shall not have the Money as Administratrix and also the Jointure too, which was agreed to be made in Consideration of the Money, and in Expectation that the Husband should have received it: and therefore dismissed the Bill with Costs. *Sed de hoc Quere;* for she is intitled to these two Demands in distinct Capacities; and the Debts may appear hereafter to exhaust the Assets; and in case the Husband had actually received the

Bill dismissed, for that she was not intitled to the Money and the Jointure too.
But *Quere.*

the Portion, and it had been in his Possession, she would have had it as his Administratrix.

Case 444.

Bale versus Newton.

Eodem die.

After a voluntary Settlement a Man cannot devise the same Estate, tho' for Payment of his Debts.

A Joint-Purchasor of Lands conveys his Part to the Use of himself for Life; Remainder, as to a third Part, to his Wife for a Jointure; Remainder of the whole to his Infant Heir in Tail; and two Days afterwards makes his Will, and devises the same Estate with other things to his Infant Heir in Tail, but subject to the Payment of his Debts, in case his Personal Estate should not be sufficient to pay his Debts, as also a Legacy of 250 l. The Personal Estate proving deficient to pay both Debts and Legacies, the End of the Bill was to have the Debts paid out of the Land, that so the Legacy might be paid out of the Personal Estate.

A Settlement, tho' Voluntary, is not revocable.

Per Cur'. The Settlement, tho' voluntary, is not revocable, and therefore having settled the Lands, the Testator had thereby disabled himself to charge the Premises by his Will.

Case 445.

Long versus Clopton.

Eodem die.

If an Heir or any other buys in an Incumbrance, he shall not be allowed, as against a Purchasor, any more than he really paid for such Incumbrance.

Ante Case 330.

ON a Master's special Report, to whom the Account in Question was referred to be taken, it was determined by the Court, that an Heir or any other shall not, as against a real Purchasor, be allowed more on any Incumbrance bought in, than what he actually paid for the same, without regard to what was really due on such Incumbrance: and that where a Prior Incumbrancer buys in a subsequent Incumbrance, with notice of an intervening Security, he shall not be allowed the same: and the Case of *Borough and Frances* was cited.

Stapleton versus Sherrard.

Case 446.
Eodem die.

PER Cur'. The Wife has a Moiety of the Personal Estate of her Husband by the Custom, and another Moiety of a Moiety, there being no Children, by the Statute for distribution of Intestates Estates. Ante Case 299. 311. 427.

Robinson versus Thompson.

Case 447.
10 Junij.

PER Cur'. Where the Major Part of the Part-owners of a Ship settle and agree an Account of the Profits of a Voyage, it shall conclude the rest: And the Plaintiff was ordered to pay Costs. In Court Lord Chancellor. An Account of the Profits of a Voyage settled by the Major Part of the Part-owners shall conclude the rest.

Herne & al' versus Meeres.

Case 448.
11 Junij.

THE Plaintiffs were Creditors of Mr. Cox, Son of Dr. Richard Cox the Physician, by Bond, upon whom a considerable Estate was settled for his Life; he was Out-lawed, and Absconded; and pending the Prosecution at Law against him, the Defendant Sir Thomas Meeres, having Notice thereof, purchased his Estate for Life, and gave between three and four Years Purchase for the same. In Court Lord Chancellor. A Purchase of an Estate of Tenant for Life, who was Out-lawed and Absconded, set aside in favour of Creditors; the Purchase being made at an Under-value, and pending the Prosecution at Law against him, and with Notice thereof.

The Bill was to be relieved against this Purchase, as being a Trust, or else it was fraudulent, it being bought at a great Under-value.

For the Plaintiffs it was insisted, the Purchase was made with full Notice of their Debts, and Prosecution at Law; that Cox absconded, and was not to be met with at that very time when the Purchase was made; that the Purchase was at a great Under-value, *to wit*, between three and four Years Purchase; whereas the Defendant might have insured his Life at 5 *l. per Cent.*

C c c c c c

For

For the Defendant it was said; as to the Over-value, that young *Cox* at the time of the Purchase was very sickly, and his Estate was not then worth more to be sold; and read some Proof to that purpose: that there was no Trust, but the Purchase was absolute; and the Plaintiffs had no *lien* on the Land: the Defendant had Notice, 'twas true, but 'twas of things immaterial; of Debts, that did not affect the Land: And if Notice of a Bond-Debt shall be sufficient to set aside a Purchase, it would obstruct all Sales of the Estates of the Persons that died Indebted.

Per Cur. The Purchase is at a great Under-value, and huddled up in haste, and at a time when young *Cox* concealed himself from his Creditors; and carries another ill Circumstance along with it, which is, that the Defendant is a Trustee in the Marriage Settlement; and for him to buy the Estate for Life of the Husband, was to take away the Maintenance and Support thereby intended and provided for the Wife and Children, on whose behalf he was intrusted; and all this with Notice of the Plaintiffs Debts, and Proceedings at Law, which ought to bear some Weight in this Case: and tho' the Plaintiffs Securities were not such, as did immediately affect the Land, yet the Notice was such; and *Cox's* Absconding, had he been a Trader, would have made him a Bankrupt, and then the Defendant must have lost all his Money: And so at Law, where a Conveyance is found to be fraudulent, the Creditor comes in and avoids all without Repayment of any Consideration-Money; and in Equity therefore, where the Court can decree back the Principal and Interest, there is no Hurt done; and a lesser Matter in such a Case will serve to set a Conveyance aside: The Court therefore decreed the Defendant to reconvey upon Payment of his Principal and Interest, and that all Creditors, that were in equal degree, should be let in *pro rata*, paying their Contribution; and that the Defendant might not any longer stand any Hazard in case young *Cox* should happen to die, the Plaintiffs and such Creditors as should come in were

Ordered

Ordered by the Court to give Security within *three Days* to redeem the Defendant.

Bill versus Price.

Case 449

Eodem die.

THE Defendant being an Exchange-Man had for many Years past practised upon young Heirs, by selling them Goods at extravagant Values, and to be paid *five* for *one* and more upon the Death of their Fathers, and had in that manner obtained from the Plaintiff and two other young Gentlemen, that were Heirs to good Estates, several Securities, wherein they were bound severally and jointly in 4000*l.* for Payment of great Sums of Money.

Per Cur'. Decree the Plaintiff's Security to be delivered up on Payment of what the Defendant really and *bona fide* paid to him alone, and for his own proper Use.

Jennings versus Selleck.

Case 450.

21 Junij.

In Court,

THE Plaintiff's Father being Lord of a West-Country Manor, and the Tenant in Possession of a Tenement refusing to renew, the Lord thereof makes a Lease for 99 Years to the Plaintiff his Daughter, and afterwards sells this Estate to the Defendant, who having notice of this Lease takes a collateral Security, that the Plaintiff should release within four Years, after she attained her Age of 21 Years.

The Plaintiff's Bill was for an Account of the Profits of the Lands comprized in the Lease, and that she might hold this Estate during the Lease, which the Defendant had got into his Possession and had suppressed.

For the Defendant it was insisted, that this Lease made by the Lord to the Plaintiff his Daughter was but a Trust for himself, and it was the usual Method that Lords of West-

Lord Chancellor.
Lord of a West-Country Manor (his Tenants refusing to renew) makes a Lease of the Premises to his Daughter for 99 Years, and afterwards sells the Manor to J S, who has notice of the Lease, but has Security that the Daughter when at Age should surrender. Daughter decreed to have the Benefit of the Lease.

West-Country Manors took, when the Tenant in Possession refused to renew; that they might have the Estate in their own Power.

Lord Chancellor. This Lease does not appear to be a Trust for the Father; but I take it to be an Advancement for his Child; and the Plaintiff having purchased with Notice of it, and taken a collateral Security, he must make the best of his Security; and therefore decreed the Possession, and an Account of Profits.

Cafe 451.

Poole versus Guise.

Eodem die.

After an Estate has been held under an Extent for a long Time, and has gone through several hands, Whether upon a Bill to redeem, the Defendant shall account otherwise than at the extended Value.

THE Bill was to redeem an Estate, which had been actually extended on a Judgment, so long since as in the 6 *Eliz.* For the Defendant it was said, that tho' under an Extent, a Man has but an Estate *quousque* the Debt is satisfied, and so the same is always in its own nature redeemable; yet after this length of time, and after the Estate had gone through *five* or *six* Hands, it was in the Discretion of the Court to direct after what Method the Account should be taken; and that the Defendant ought not to account for more than the extended Value: But this Cause went off, upon a Proposition that the Defendant should be allowed what he paid, and account only for what he received during his own time.

Cafe 452.

Brett versus Marsh.

23 Janij.

In Court.

Lord Chancellor.

A Creditor by Judgment and also by Bond receives 200*l.* in part, of the Purchase for of the Estate of the Debtor, but gives no Notice that he would

ON Exceptions to a Master's Report, to whom the Account in question was referred, it appeared the Defendant was an Incumbrancer by Judgment, and had also a Debt by Bond, and received 200*l.* of the Purchaser of the Estate in part, but gave no Notice to the Purchaser, that it was to be applied towards Payment of the Bond-debt.

Per

Per Cur'. It shall therefore be applied towards Satisfaction of the Judgment, the 200*l.* being part of the Purchase-Money.

apply it to the Bond-debt. It shall be applied towards Satisfaction of the Judgment.

Noell versus Robinson.

Case 453.

25 Junij.

PER *Cur'.* A Plantation in *Barbadoes* is not a Testamentary Estate by the Laws now in force; and therefore confirmed the Lord *Nottingham's* Decree, which was for the Plaintiff Sir *Martin Noell's* Children.

Lord Chancellor.
Ate 25/80.
426. 436.

Capell versus Brewer.

Case 454.

5 Julij.

THE Bill was to be relieved against an Extent out of the *Exchequer*, taken out by the Contrivance of a Farmer of the Excise, who having a Debt owing him by a Man, that failed, procured the *King* to take that Debt in aid, and by that means to defeat all the other Creditors.

Lord Chancellor.
A Farmer of the Excise having Estate of his own sufficient to satisfy what he owed the *King*, takes out an Extent in aid against a Person, who owed him Money, and had failed. Decreed to refund with Costs.

Per Cur'. It is become a common Practice, and a great Oppression in the City, that any Accomptant to the *King* shall sell Wines upon Credit at an extravagant Price, and when the Man fails, an Execution comes, as the first Process, out of the *Exchequer* at the *King's* Suit, and sweeps away all; so that all other just Creditors are defeated, and a Commission of Bankrupt rendered ineffectual; and therefore declared, that where a Farmer of the Excise, as the Principal Case was, or other Accomptant to the *King*, had sufficient Estate of his own to satisfy the *King's* Debt, and should use this Trick to defeat other Creditors, by getting the Debt owing to him to be taken in Aid of the Debt to the *King*, such Person should refund with Costs; and decreed it accordingly.

Cresly versus Carrington.

Case 455.

Eodem die.

THE Matter in difference having upon the Hearing been referred by the Court to Gentlemen in the Country,

Lord Chancellor.
An Award made pursuant to an Order of Court must be

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confirmed, as is done upon a Master's Report, and either Side has a Liberty to except to it.

Country, who had made an Award therein, the Cause was set down to be heard upon the matter of the Award, but was thrown off as coming on irregularly, for that the Plaintiff ought first to have moved to confirm the Award, as is done upon a Master's Report, and either Side may except to it, if they find occasion; and then the Matter will properly come before the Court on those Exceptions.

Case 456.

7 Julij.

Lord Chancellor.

A Defendant having sworn that he received no more than such a Sum to his remembrance, allowed to be sufficient.

Hall versus Bodily.

ON Exceptions to an Answer, the Defendant having sworn he received no more than the Sum of ----- to his Remembrance, it was allowed to be a good Answer.

Case 457.

Eodem die.

The Court not satisfied with the Rule, that an Accomptant shall be allowed on his own Oath all Sums not exceeding 40 s. so as the whole is not above 100 l.

WHICHERLY *versus* WHICHERLY.
THE Court being informed, that the Course of the Court was that an Accomptant was to be allowed on his own Oath all Sums not exceeding 40 s. each, so as the whole was not above 100 l. declared *that* Rule seemed very unreasonable, and would consider how to rectify it.

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Term. S. Michaelis,

3 Jacobi II. 1687.

IN CURIA CANCELLARIÆ.

Kettleby versus Atwood.

Case 458.

19 Octobris.

In Court,

Lord Chancellor.

Ante Case 293.

THIS Cause came on to be Reheard, and the Question now was between the Wife and the Heir on the Part of the Husband, who should have the Money after the Death of the Wife; the Wife being Administratrix both to her Husband and her Child: And the Court decreed for the Heir, that the Money was bound by the Articles, and should be for the Benefit of the Heir, as the Land should have gone, in case the Money had been laid out according to the Articles: And the Case of *Whittick* and *Fermin* was cited, which had been lately Decreed by this Chancellor, and was a Case in Point; and the Chancellor said, he remembered the Case of *Lawrence* and *Beverley* upon a special Verdict before the Lord Ch. Justice *Hales*, in which himself was of Council, and it was there ruled, that the Money was not Assets to satisfy a Creditor, but was Bound by the Articles. 2 Keob. 841.

In the Arguing of this Case it was insisted for the Defendant, that the Wife by the Articles had an Election, in case her Husband died without Issue, whether she would have

have the Land or the Money; and had six Months time to make this Election after the Death of the Husband; and altho' the Husband had Issue at his Death, yet that Issue died within the six Months, and therefore the Wife might elect. *Sed non allocatur*, for the Husband having Issue at his Death, he could not be said to die without Issue; so no Election could arise to the Wife. And the Case of *Goodier and Clark* was cited in *Siderfin, Part. I. fo. 102.*

Case 459.

Eodem die.

Lord Chancellor.

A agrees with *B* to purchase a Copyhold for two Lives; *A* pays 200*l.* in part, and was to pay the Remainder in three Months, and then to name his Lives and take up his Copy; a Court is held, the three Months expire, and *B* dies suddenly; and the Manor comes to one who was not bound by this Agreement.

The Executor of *B* decreed to repay the 200*l.*

Awbry versus Keen.

THE Plaintiff was Tenant to Mr. *Thynne*, and contracted with his Steward or Bayliff for a Copyhold Estate for two Lives; he pays 200*l.* down, and was to pay the Residue on the taking up of his Copy, which he was to do in three Months, and then to name his two Lives. A Court was held accordingly, the three Months expire, and the Plaintiff neglects to name his two Lives and take up his Copy; and before any thing further was done, Mr. *Thynne* died suddenly, being murdered; upon whose Death the Manor came to the Lord *Weymouth*, by vertue of a Remainder limited in a Settlement, so that he was not bound by this Agreement.

The Plaintiff's Bill was to compel the Defendant, Mr. *Thynne's* Executor; to refund; which was Decreed accordingly, altho' it was insisted, that it was the Plaintiff's own Laches that he had not the Estate.

Case 460.

Eodem die.

Lord Chancellor.

A and *B* being joint Lessees, *A* by Parol agrees to sell his Interest

Alsopp versus Patten.

THERE are two joint Lessees of a building Lease; the one agrees to sell his Moiety to the other by Parol for four Guineas, and accepts a pair of Compasses in Hand

Hand to bind the Bargain; the Bill is to have a specific Performance of the Agreement.

The Defendant pleads the Statute of *Frauds* and *Perjuries*: The Agreement being in some part executed, the Court ordered the Defendant to answer, and saved the Benefit of the Plea to the Hearing.

Winn versus Fletcher.

THE Plaintiff entitles himself as Administrator, the Defendant pleads the Plaintiff is not Administrator. It was objected this is a Negative Plea. *Per Cur'*. Allow the Plea: It is a good Plea in Abatement at Law.

Foster versus Munt.

JOHN Markham by Will, devised particular Legacies to his Children and Grand-children, and 100*l.* a-piece to Munt and one Symonds, whom he made Executors, for their Care. The Surplus being 5000*l.* and upwards, the Question was, whether the Surplus should be a Trust for the Children, or go to the Executors. Decreed a Trust for the Children.

Barker versus Talcot and Shaw.

THE Plaintiff Barker held a Farm by Lease from one Talcot, who dies intestate, and Talcot his Son takes Administration, and settles an Account with Barker for the Rent then in Arrear, which amounted to 60*l.* Barker satisfied 29*l.* part thereof, by Cheese, &c. and gives a Note under his Hand promising Payment of the remaining 31*l.* to Talcot the Son: Before the 31*l.* are paid, Talcot the Son also dies Intestate, and afterwards Plaintiff Bar-

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to B, and accepts a pair of Compasses in Hand to bind the Bargain. Whether this is within the Statute of Frauds?

Case 461.
Eodem die.
Lord Chancellor.

Plaintiff entitles himself as Administrator. Defendant pleads Plaintiff is not Administrator. A good Plea in Abatement in Equity, as well as at Law.

Case 462.
25 Octobris.

In Court, Lord Chancellor. A. B. by Will gives Legacies to his Children and Grand-children, and 100*l.* a-piece to his Executors for their Care; and makes no Disposition of the Surplus. Decreed the Executors to be Trustees for the Children, as to the Surplus.

Case 463.
27 Octobris.

In Court, Lord Chancellor. A indebted to B for Rent. B dies. C Administrator to B. A gives a Note for this Rent to C. C dies intestate. This Note is a

ker

Alteration of
the Property,
and the Rent
belongs to the
Administrator
of C. and not
to the Admin-
istrator *de bonis*
non of B.

ker pays the 31 *l.* to Mr. *Shaw* the Administrator of the Son: After this *Talcot* the Defendant takes out Administration *de bonis non* to *Talcot* the Father, and then brings an Account against Plaintiff for the 31 *l.* Upon the Tryal the Judge doubting, whether the Note given to *Talcot* the Son was an absolute Conversion, a Verdict was suffered for the Plaintiff, which by Agreement was to stand as a Security, and a Case was to be made for the Opinion of the Judges; and pending that Matter, *Barker* brought his Bill against the Administrator of the Son, and also against the Administrator *de bonis non* of the Father, setting forth the Matter as above, and praying Relief, and that he might not be doubly charged, and compelled to pay the same Money twice.

The Lord Chancellor on a full Hearing adjudged the Note given to *Talcot* the Son for the 31 *l.* to be *quasi* a Payment, and a good Conversion in him, and that the same ought to go to his Administrator, and not to the Administrator *de bonis non* of the Father.

Sir Tho. Jones's
R.p. 68.

A owes Money
to B who dies,
and his Admin-
istrator takes
A's Covenant
for the Debt. A
becomes insol-
vent: This is a
Devastavit in
the Executor.

In the arguing of this Case was cited the Case of *Norden* and *Levett*, where an Administrator brought *trover* for Goods, and recovered, and takes part in Hand, and accepts a Covenant for Satisfaction of the Residue; and the Debtor afterwards failed. It was adjudged in the *King's-Bench* to be a *Devastavit* in the Administrator, and the Judgment was afterwards confirmed upon a Writ of Error in the House of Lords: And the Lord Chancellor cited a Case adjudged by Serjeant *Pemberton*, when Chief Justice, where an Executor of an Obligee accepted a Note drawn on a Goldsmith for the Money, the Goldsmith accepted the Bill, and before Payment fails: The Executor afterwards brought an Action upon the Bond, and this Matter being given in Evidence was adjudged a good Payment.

Gale versus Lindo.

Case 464.

29 Octobris.

THE Case was, that when a Marriage was treating between one *Gringer* and the Sister of *William Pitman*, the Woman not having so great a Portion as the Man insisted upon; she prevails with her Brother *Pitman* to let her have 160 *l.* to make up her Portion, and gave him Bond for Repayment of it; and thereupon the Marriage was had: And the Husband, who knew nothing of the Bond, died without Issue, and his Wife survived him, and afterwards died having made her Will, and the Plaintiff Executor. *William Pitman* the Brother dies, and makes the Defendant his Executor, who put the Bond in suit against the Plaintiff, as Executor of the Widow, to recover back the 160 *l.* and thereupon he brings his Bill to be relieved.

In Court
Lord Chancellor.

A on the Treaty of Marriage of his Sister with B lets her have 160 *l.* privately, that her Fortune might appear to be as much as was insisted on by B, and takes her Bond to repay it.

The Executor of A puts the Bond in Suit against the Executor of the Sister, who survived her Husband.

Upon a Bill to be relieved, Bond decreed to be delivered up as fraudulent.

For the Defendant it was insisted, that altho' this might be a Fraud, as against the Husband or any Issue of his, who were to have the Benefit of the Marriage Agreement; yet the Husband being dead, and there being no Issue, this Bond is good against the Woman her self, and by Consequence against her Executor, there being no Creditors in the Case, or any Deficiency of Assets pretended.

Lord Chancellor. You admit the Husband might have been relieved on a Bill brought by him and his Wife; that which was once a Fraud, will be always so; and the Accident of the Woman's surviving the Husband will not better the Case. Decreed the Bond to be delivered up, and a perpetual Injunction against it.

Quære, If the Condition of the Bond had been, that in case the Woman survived her Husband, that she should repay it, whether she could have been relieved?

Note,

Note, It was opened in this Case, that after the Death of the Husband, the Wife agreed to repay the Money, and actually paid Part. *Sed non allocatur.*

Case 465.

4 Novembris.

In Court
Lord Chancellor.

Mortgagee assigns his Mortgage for less than is really due to him.

The Mortgagor shall not redeem without paying the whole Money due on the Mortgage.

Williams versus Springfeild.

THE Plaintiff had Mortgaged the Lands in Question to J S, who finding it was a slender Security, and not worth the Money due thereon, the Plaintiff's Wife, in case she should happen to survive her Husband, having a Right of Dower in the Mortgaged Estate, J S. agreed with Defendant *Springfeild* to Assigne the Mortgage to him for 100*l.* altho' there was 150*l.* then due to him thereon. The Plaintiff now brought his Bill to redeem, and the sole Question was whether the Defendant should be allowed all the Money that was then really due on the Mortgage.

Where there are subsequent Incumbrances or Creditors in the Case, a Man that buys in a Prior Incumbrance shall be allowed only what he really paid.

But otherwise it is, as between him and the Mortgagor or his Heir.

Per Cur'. Where there are subsequent Incumbrances or Creditors in the Case, there a Man, that buys in a Prior Incumbrance, shall be allowed only what he really paid, tho' there was in truth a greater Sum due: But where the Mortgagor himself or his Heir comes to redeem, there is no Reason that he should have the Benefit of a good Bargain made by another Man, and ought therefore to pay what is really due on the Mortgage, whatever it be, without respect to what the Assignee paid: And decreed it accordingly.

Case 466.

11 Novembris.

In Court,
Master of the Rolls.

A conveys Lands to B, who is put in possession, but under an Agreement, that if A pays the Money in 10 Years, B shall recover.

Fultbrope versus Foster.

THE Mother, who had an Estate for Life, joins with her Son, who had the Inheritance, in a Conveyance of Lands of 4*l. per Ann.* and a Profit out of some Cole-mines, which *communibus annis* were worth 9*l. per Ann.* for 90*l.* The Deed was absolute, and the Vendee was immediately put into Possession, but on a Proviso, that if the Son should pay

pay the Mony at the end of 10 Years, the Defendant should reconvey to the Son.

The Profits appearing to be much more than the Interest, upon a Bill by the Plaintiff to redeem, B decreed to account for the Profits, and not permitted to set the Profits against the Interest.

The Bill was brought by the Son to redeem; and the sole Question was, whether the Defendant should retain the Profits in lieu of the Interest, or should Account for what he had received out of the Estate.

It was insisted, that the Mother, who had parted with her Estate for Life, had the most reason to complain, and yet she was content the Defendant should have the Profits in lieu of the Interest; that the Son had a good Bargain of it, for he had got to himself his Mother's Estate for Life, and that this was but like the Case of *Welch* Mortgages, where the Mortgagee is put into Possession immediately, under a Proviso to have a Reconveyance on Payment of the Principal Money; sometimes at a time prefixt, and often at any time whatsoever; and there the Profit always goes against the Interest. That this Case was stronger, by reason that the Profits here arising out of the Cole-mines were more uncertain than the Profits of Lands.

But the *Master* of the *Rolls* thought, that in this Case the Profits being 13*l.* *per Ann.* 'twas altogether unjust and unreasonable, that the same should go in lieu of the Interest of 90*l.* And as touching *Welch* Mortgages, he thought, if the Value was excessive, the Court would Decree an Account, notwithstanding the Agreement for retaining the Profits in lieu of Interest: and he thought the Court would relieve against a *Bristol* Bargain, to wit, where *A* lends *B* 1000*l.* on a good Security, and as to one 500*l.* it is agreed between the Parties, that it should be repaid together with Interest for it, as it should become due; and as to the other 500*l.* that *B*, in Consideration thereof, should pay unto *A* 100*l.* *per Ann.* for seven Years; and in the principal Case he decreed a Reconveyance on Payment of what should appear to be due, discounting the Profits received.

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Deering

Case 467.

12 Novembris.

In Court,
Master of the
Rolls.

As by Will gives
the Surplus of
his Personal E-
state to his
Daughter,
whom he
makes Execu-
trix, and willed,
that if she died
without Issue
it should go
over to B, and
that she should
give Security
that if she died
without Issue
it should go
over accord-
ingly.

The Devise
over is Void; but
whether the
directing a Bond
to be given &c.
does not alter
the Case?

Deering versus Hanbury.

J. S. by Will having disposed of a Term for Years; whereof he was Possessed, and bequeathed several Legacies, devises all the rest of his Estate (being Chattels Personal only) unto the Defendant his Daughter, whom he also makes Executrix; But willed, that in case his said Daughter died without Issue, that the same should go over to the Plaintiffs; and appoints that she should give Security, that in case she died without Issue, the Estate should go over accordingly.

The Bill was to compel the Defendant to discover the Estate, and to give Security. The Defendant demurred, for that the Devise-over was void, and that therefore she ought not to be enforced, either to discover the Estate, or to give Security.

The Council for the Plaintiff did admit, that had there been nothing more in the Case, than a Devise to the Defendant and her Issue, and in case she died without Issue, it should go over to the Plaintiffs; *that* would have been void, had the Devise been of a Term for Years, and much more of Chattels meerly Personal, as the Principal Case was; for where Chattels Personal are devised to one for Life (that is, if the things themselves, and not the bare Use thereof only, be devised) a Devise over is void; and

2 Ch. Rep. 167.

cited the Case of *Whitmore* and *Chemish*; but they took it, that the Testator having made his Daughter as well Executrix as Residuary Legatee, and appointing her to give Security for the Purpose aforesaid, it made this a different Case from those, that had been put: and they took it clearly, that if a Man by his Will gave his Estate to his Executor upon Condition, that the Executor after his Death should have his Estate fairly Appraised, and Inventoried, and directs that his Executor should within *six*

Months

Months give Bond to I S, conditioned to pay to I S such Sum, as the same should be appraised at, at the end of *ten, twenty or thirty* Years after his Death, that such Conditional Devise would be good; as would also the Bond: And so they took it, it would be, in case the Condition was to give Bond to pay the Value thereof to I S, in case the Executor should die without Issue: and so in the Principal Case, tho' the Devise-over would not be good as to the Personal Chattels themselves, which were every day wasting and spending; yet the Security would be good for the Value thereof.

But it was observed by the Plaintiff's Council, that the Security in this Case by the Will appointed to be given was not to pay the Value of the Estate, but that the Estate it self should go over upon her dying without Issue, which was repugnant and void in Law: for this in effect is to entail a Bond, and should this be admitted, in time we should (as a Judge upon the like Occasion once expressed himself) entail old Shoes.

The *Master* of the *Rolls* thought fit to save the Benefit of the Demurrer to the Hearing: and appointed the Defendant to answer as to the Will, but not to discover the Estate, unless the Court should so think fit upon the hearing of the Cause.

Towers versus Davys.

THE Plaintiff as Heir at Law brought a Bill for the Deeds and Writings that concerned his Estate; the Defendant insisting, that she having a Jointure of Part, ought not to discover or part with her Writings, until her Jointure was confirmed:

Case 468.

14 Novembris.

In Court,
Lord Chancellor.

The Heir is not intitled to see any Deeds in the Hands of the Jointress, without confirming her Jointure, tho' the Jointure was made after Marriage,

For

For the Plaintiff it was insisted, the Jointure was made after Marriage, and not pursuant to any precedent Articles, and was purely voluntary.

Per Cur'. Confirm the Jointure, or you shall not see the Deeds. But whereas the Defendant insisted she was intitled to other Part of the Estate as Administratrix, by reason of a Lease for Years, which had been heretofore made thereof, and she having by Letter acknowledged, that the Lease was intended to attend the Inheritance, the Court compelled her to agree to relinquish all her Pretensions to the Lease, and unless she would so do, declared she should be ordered to produce all the Writings without having any Confirmation of her Jointure.

Case 469.

15 Novembris.

In Court,

Lord Chancellor.

A on the Marriage of his Son covenants to settle Lands to the Use of the Son for Life, then to the Wife for Life, Remainder to the Heirs Male of the Body of the Son. A dies and makes his Son Executor, who dies and makes a second Wife Executrix. The Grandson brings a Bill against the Executrix to have Satisfaction on the Covenant, or that he might sue it in the Trustees Names.

Bill dismissed, the Plaintiff's Father being Tenant in Tail, and might have

Sir William Cann Barr^t versus Domina Anna Cann Vid^a.

WILLIAM Cann, the Plaintiff's Grand-father, on the Marriage of Sir Robert Cann, the Plaintiff's Father, settled the Manor of Breane in Gloucestershire and other Lands to the Use of Sir Robert for Life, then to his intended Wife for Life, Remainder to the Heirs Males of the Body of Sir Robert; and covenanted to purchase other Lands of the Value of 50 *l. per Ann.* and to settle them to the like Uses. William the Grandfather died, and left a considerable Personal Estate, and made Sir Robert his Executor. Sir Robert levied a Fine and thereby barred the Entail of the settled Lands, and by his Will gave his Estate to his Son by the Defendant, who was his second Wife, and gave the Plaintiff an Annuity of 200 *l. per Ann.* for Life only, and that upon Condition to release his Executrix of all Demands, which he refused to do, by reason that his Father had in his Life-time entered into a Bond of the Penalty of 12000 *l.* to leave the Plaintiff 6000 *l.* at his Death.

The

The Plaintiff's Bill was, that he being the Issue in Tail might have Satisfaction made him on this Covenant, or at least might have liberty to sue the Covenant in the Trustees Names; and it was said, that it was the more reasonable the Plaintiff should take Advantage of the Covenant, in regard he was disinherited.

barred the Plaintiff if a Settlement had been made.

But it being insisted for the Defendant, that this was a Covenant of *William* the Grandfather, and was broken in the Life-time of *Sir Robert* the Plaintiff's Father, who thereby became intituled to the Damages on that Covenant; and the Plaintiff's own Bill was, that *Sir Robert* as Executor to his Father had out of his Personal Estate retained a Satisfaction for the Non-performance of this Covenant; and that in case the Lands had been purchased and settled according to the Covenant, yet it had the next Day been in the Power of *Sir Robert* to have barr'd the Entail by levying of a Fine, or suffering a common Recovery; and that therefore there was no reason now to carry this Covenant into an Execution in Equity for the Benefit of the Plaintiff, the Issue in Tail, and that against the Executrix of an Executor: The Court was clear of an Opinion, that in regard *Sir Robert* had been Tenant in Tail, in case this Settlement had been actually made, and so might have barred the Estate, the next Day, as he hath done all other the intailed Lands; that the Plaintiff ought not to be relieved as touching that Covenant, but dismissed that Part of the Bill.

And the Bill being also to have Satisfaction for a Legacy of 50*l.* devised to the Plaintiff by *Humphrey Hooke* his Grandfather in 1658, and another Legacy of 100*l.* which was devised to the Plaintiff by *Cicily Hooke* his Grandmother in 1660, both which had been received by his Father, it was insisted for the Defendant, that the Plaintiff had received ample satisfaction for these Legacies from his Father in his Life-time; and more particularly that the Bond of 12000*l.* entered into by *Sir Robert* to

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leave

leave the Plaintiff 6000*l.* at his Death, was in time long after he had received these Legacies; and that all the Plaintiff's Demands must naturally be intended to be included in this Bond; and that besides all this, the Plaintiff in Answer to a Cross Bill had insisted on the Statute of Limitations.

Lord Chancellor. I will do all I can to help an Heir that is disinherited; and you shall be allowed nothing more than what you can prove to have been actually paid towards Satisfaction of these Legacies; and *eo nomine*, as in part of the Legacies, and shall pay the Residue with Interest.

Cafe 470.

Gosling versus Dorney.

16 Novembris.

In Court
Lord Chancellor.

Where Lands
are devised for
Payment of
Debts and Le-
gacies, the
Debts and Le-
gacies shall be
paid *pari passu*.

WHERE Land is devised to be sold for Payment of Debts and Legacies: The *Lord Chancellor* was of Opinion, that the Debts and Legacies should be paid in equal proportion, without any Preference to the Debts: And so it was resolved in the Case of Sir *John Bowles* by the *Lord Nottingham*, that Debts and Legacies should be paid *pari passu*; but the *Lord North* reversed that Decree, and gave Preference to the Debts: And so the *Lord North* likewise in the Case of *Hixon* and *Witham*, decreed the Debts to be first paid; but the *Lord Chancellor* declared he was not satisfied with that Opinion, but would consider of it.

1 Ch. Rep. 248.

Cafe 471.

Lady Shore versus Billingshy.

Eodem die.

Surplus of a
Personal Estate
bequeathed to
A and *B*.
It is a joint
Devise, and
shall survive.

A Man having devised the Surplus of his Estate after his Debts paid to *A* and *B*, *A* dies. It was adjudged in the *Delegates*, and decreed by the *Lord North*, and now confirmed by the *Lord Chancellor*, that this was a joint Devise, and should survive to *A*; and the *Lord Chancellor*

cellor's Opinion was, that if *A* and *B* had been made Executors, and *A* had possessed a Moiety of the Goods and died, it would have been all one: And the Case of *Cox* and *Quaintont* was cited, where there were two joint Executors, and one died; adjudged his Executor or Administrator should not have an Account against the Survivor.

There are two Executors, and one dies, his Executor or Administrator shall not have an Account against the Survivor.
1 Ch. Rep. 238.

Whaley versus Norton & al'.

Case 472.
18 Novembris.

THE Bill was to be relieved against a Bond and Judgment, defeazanced for the Payment of 400 *l.* to the Defendant; and the Bill charged, that whereas the Security recited 400 *l.* to have been lent and paid by the Defendant to the Plaintiff, that in truth the Money was never really lent or paid: The Defendant by Answer confessed, that the 400 *l.* was not lent or paid by her, and that it was never meant or intended so to be, and that it was the Mistake of the Scrivener in making the Security after that manner, for that the 400 *l.* thereby intended to be secured was the free Gift of the Plaintiff unto the Defendant.

In Court
Master of the
Rolls.

Bill to be relieved against a Bond to pay 400 *l.* to a Woman whom the Plaintiff kept as a Mistress. Relief denied.

The Truth of the Case was, that the Defendant was for some time kept by the Plaintiff, and this 400 *l.* was given her upon that Account; but of that no Notice was taken in the Bill, and the Council for the Defendant insisted, that it being a free Gift, no Equity could relieve against it; and cited the Case of *Bourman* and *Uphill*, which was this very Case in point, and the Equity laid in the Bill the same, *to wit*, that it purported to be a Security for Money lent; whereas no Money was really lent or paid: And the Court would not relieve in that Case, tho' the Gift was upon the like Account: And the Case of *Peacock* and *Mainklin* was also cited.

The Master of the Rolls said, that there would be a Difference in these Cases between a Contract executed and
exe-

But otherwise
it had been, if
the Obligee
was a common
Strumpet.

But then it
must be so
charged in the
Bill, and put in
Issue; for o-
therwise, if it is
so proved, the
Depositions
cannot be read.

executory; and that this Court would extend Relief as to things executory, which if done, it may be might stand: But as this Case was, he saw no ground to relieve the Plaintiff, nothing appearing to him, but it was a free and voluntary Gift, without any thing of *turpis contractus*: And in case it had been so, yet we know that *Adam* was punished, tho' tempted by *Eve*; because he would be tempted. But if it had been charged in the Bill, that the Defendant was a common Strumpet, and she commonly dealt and practised after that sort, and used to draw in young Gentlemen, in such case he thought it reasonable the Court should relieve; and the Plaintiffs had in this Cause proved as much; but the Defendant's Council opposed the reading to that Matter, by reason it was not charged in the Bill, nor in Issue in the Cause; so they prayed Liberty to amend their Bill, and to charge that special Matter, paying the Costs of that Day, and of the Depositions taken in the Cause.

John Walley an Infant *per Prochein*
Amy Plaintiff.

Case 473.
19 November.

In Court,
Lord Keeper.

Peter Whalley, Thomas Gaudy, Robert War-
ner, & al. Defendants.

An Executor
in Trust for an
Infant Reti-
duary Legatee
renews a Lease,
part of the
Testator's Per-
sonal Estate, in
his own Name,
and having
Mortgaged it,
assigns the E-
quity of Re-
demption to a
Trustee to sell
for Payment
of his own
Debts.
The Trustee
sells to one
who had no-
tice of the In-
fant's Title.
Purchase set
aside.

Francis Walley, the Plaintiff's Grand-father, being, amongst other things, possessed of several Messuages and Tenements at *Mile-end* in *Stepney* in *Com' Middlesex*, for a Term of 40 Years, in which there was at his Death about 35 Years to come, which he held by Lease from *Clare-hall* in *Cambridge*, and which Messuages were worth about 90 *l.* *per Ann.* over and above the Rent reserved on the Lease, and being so possessed and of other Personal Estate, in *November 1671* he made his last Will and Testament, and thereby devised several Legacies amounting unto about 60 *l.* and then devises in these Words, *viz.* Item, *all the rest and residue of my Lands, Houses, Tenements, Goods, Chattels,*

Chattels, Household-Stuff, and Plate, Jewels, and whatsoever else belongs to me in this World, as well that which is unnamed, as that which is named, I give and bequeath unto my loving Grand-child John Walley the younger (to wit the Plaintiff) and I do make my Son-in-law John Walley (to wit the Plaintiff's Father) Executor in Trust for my said Grand-child John Walley. Afterwards in 1677 the Testator died, and John Walley the Father proves the Will; possesses the Personal Estate, and in March 1678 surrenders the old Lease, and takes a new Lease from Clarehall in his own Name for the same Term as was unexpired of the old Lease, and without Payment of any Fine or other Consideration; and having so done, he Mortgages part of the Estate to one Williams for 200 l. which Mortgage by mesn Assignments was come down to the Defendant Seymour in trust for Gaudy, who had lent a further Sum of 350 l. on a Security by way of Mortgage of the Premises: After this John Walley, the Plaintiff's Father, makes an Assignment of his Equity of Redemption to the Defendant Peter Whalley upon trust to sell and dispose of the Premises for Payment of his Debts, and then goes beyond Sea as a common Soldier to the Indies in the Service of the East India Company. The Defendant Warner being a Sea Captain; and having got a Sum of Money together, employs one Peters a Scrivenier to find him out a Purchase, who informs him of the Estate in question; and brings Peter Whalley the Trustee and Warner together, and Warner contracts with Whalley to purchase the Premises at the Price of 870 l. and pays off Gaudy, and takes an Assignment of his Mortgage.

The Plaintiff's Bill set forth the Matter, *ut supra*, and charged that Gaudy, before he lent his Money, as also Warner, before he had paid any part of his Consideration Money, had full notice of the Plaintiff's Title, and that his Father was only Executor in Trust for him; and therefore prayed an Account of Profits, and to be let into Possession, and to have the new Lease assigned.

H h h h h h

Gaudy

Gaudy by Answer confessed, that he had Notice before the lending of the Money; but that he was at the same time told, that *Calley* the Grand-father died greatly indebted, and that his Executor was in disburse 500 l. and more for the Payment of his Debts, and set forth what Profits he had received during the time he was in Possession; and that he had accepted of what rested due on his Mortgage from *Warner* the Purchasor, and had thereupon assigned the same unto him.

Warner set forth his Purchase, and that he had paid off *Gaudy*, and taken an Assignment of his Mortgage, and that he had not yet paid the Residue of his Purchase-Money; but had given a Note for it to *Peter Whalley* the Trustee, and denied he had notice of the Plaintiff's Title before his Purchase.

The Cause coming this Day to be heard, and it being fully proved, that *Warner* had Notice before any of his Purchase-Money was paid, or Deeds executed, and that the Will of *Calley* was read over both to him and *Peters* the Scrivener before his Purchase: It was insisted by his Council, that he ought notwithstanding to have the benefit of *Gaudy's* Mortgage; for that it was not proved in the Cause, that *Gaudy* had notice before he lent his Money; and tho' *Gaudy* had by Answer confessed Notice, yet that could not bind *Warner* the Purchasor; but that the Plaintiff might have examined *Gaudy de bene esse* against *Warner* to have proved the Notice; and that *Gaudy* being before the Court, the Plaintiff might take a Decree against him for that Money. But it was answered, that *Warner* having purchased with full Notice, he stands affected with the Trust, and can't defend himself as an innocent Purchasor; and tho' *Gaudy's* Answer cannot be read against him as Evidence; yet if he would mend his Case, on pretence that *Gaudy* had no Notice, he then must stand in *Gaudy's* place, and *Gaudy's* Confession of Notice, as to the Title he derives from *Gaudy*, will bind him; and *Gaudy* cannot
transfer

transfer to *Warner* a better Right, than he himself had, and he confesses he came in with Notice; and *Warner's* Council then prayed, in regard that *Gaudy* was a Defendant before the Court, that the Plaintiff might take his Decree against *Gaudy* for the Money paid to him by *Warner* the Purchasor.

The Court decreed the Plaintiff should be let into Possession, and have the Benefit of the new Lease, and an Assignment thereof from the Defendants, and an Account of the Profits, for what each Defendant respectively had received: But with this, that the Master should also take an Account of the Personal Estate of *Calley*, the Plaintiff's Grand-father, and what the Plaintiff's Father paid for the Debts and Legacies of *Calley*, more than what the other Personal Estate of *Calley* would amount unto, should be allowed upon the Account; and *Warner* should be likewise allowed what he had laid out in lasting Improvements upon the Premises, tho' they were made pending the Suit; and that *Peter Whalley* should deliver up to *Warner* the Note or Bill he gave for the Payment of the residue of his Purchase-Money, and *Warner* was left at liberty to bring his Bill against *Gaudy* for the Money he had paid to him on the Assignment of his Mortgage.

In the Arguing of this Case was cited the Case of *Culpepper* and *Aston*, wherein it was settled, that where Trustees are appointed to sell Lands for the Payment of Debts, the Sales by them made of what was more than sufficient for the Payment of Debts are not good. 2 Ch. Rep. 115.
Vide Case 297.

Note, In this Case the Plaintiff's Father, who was the Executor in Trust, being gone to the *Indies* as a common Soldier in the Service of the *East India* Company, and the Plaintiff making Affidavit of that Matter, and that he knew not whether his Father was living or dead, nor where to find him to serve him with Process, it was upon a Motion Ordered, that the Plaintiff might Proceed against the other Defendants without prejudice, for not bringing his Father to Hearing; and the Plaintiff had the Decree *supra* without bringing his Father to Hearing.

A necessary Defendant being beyond Sea, upon Affidavit made thereof, and that Plaintiff knew not whether he was living or dead, he had an Order upon Motion to proceed against the other Defendants without prejudice, and afterwards had a Decree without bringing such Defendant to Hearing.

Willett

Case 474.

Eodem die.

In Court,
Lord Chancellor.*Willett versus Winnell.*

THE Plaintiff was the youngest Son of his Father, who was seized, according to the Custom of the Manor of *Wolverly*, of a Copyhold Tenement of the nature of *Burrough English* of the Value of 15 *l. per Ann*; and in *April* 1671, the Plaintiff's Father having borrowed 200 *l.* of the Defendant's Father, for securing the same made a Conditional Surrender into the hands of two customary Tenants of the Manor, to be void on Payment of the 200 *l.* and Interest in *April* 1672; and at the same time the Defendant's Father entered into a Bond, conditioned that if the 200 *l.* and Interest should not be paid at the Day, then if the Defendant's Father should pay to the Plaintiff's Father, his Executors, Administrators or Assigns, the further Sum of 78 *l.* in full for the Purchase of the Premises within *ten* Days afterwards, that the Bond should be void, or otherwise stand in full Force.

The Plaintiff's Father died in *November* 1671, before the Mortgage was Forfeited, leaving the Plaintiff an Infant of *two* Years old; and the 200 *l.* with Interest not being paid at the Day, the Defendant pays the 78 *l.* the next Day after the Mortgage was Forfeited, to the Administrator of the Plaintiff's Father, according to the Condition of the Bond.

The Plaintiff's Bill was to redeem, on Re-payment of the 200 *l.* with Interest, discounting the Profits. The Defendant by Answer insisted it was an absolute Purchase.

The Court decreed a Redemption, making no doubt but it continued a Mortgage, and was not an absolute Purchase: but as to the 78 *l.* declared that to be well paid to the Administrator, and therefore Ordered the whole Moneys with Interest to be repaid and Costs, discounting the mesne Profits.

Edwin versus Thomas.

Case 475.

25 Novembris.

*In Court,
Lord Chancellor;*

THE Bill was to be relieved touching the Trust of a Copyhold Estate. In the Debate of this Case it was alledged, and so it appeared by an Antient Book of Survey, that by the Custom of the Manor of which the Estate was held, Copyhold Lands there should not only go to the youngest Son, but also in case the youngest Son died without Issue, it should go to his youngest Brother and not to the eldest; and if no Sons, that it should go to the youngest Daughter; and likewise that if the Copyholder had had several Wives, the Lands should go to the youngest Son by the first Wife. And the Principal Question in this Case being, whether upon the Death of the youngest Son it should go to his next youngest Brother or to the eldest, the *Chancellor* directed an Issue for Tryal of the Custom.

In speaking to this Case, the *Chancellor* cited a Case adjudged by the Lord Chief Justice *Hales*, that a Rent-charge created *de novo* issuing out of Gavel-kind Lands should follow the nature of the Land, and descend in Gavel-kind.

Rent-charge in
Fee granted out
of Gavel-kind
Land shall
descend in
Gavel-kind.

Sir Bazil Firebrasse versus Brett.

Case 476.

26 Novembris.

*In Court,
Lord Chancellor.*

THE Defendant and Sir *William Russell* dining with the Plaintiff at his House, after Dinner fell into Play with the Plaintiff, and won of him in ready Money about 900*l.* which *Brett* brought away with him (tho' when they began to Play the Defendant and Sir *William Russell* had not above eight Guineas between them) and Sir *Bazill* being somewhat inflamed with Wine brought down a Bag of Guineas containing about 1500*l.* and *Brett* won that Money also, and had it in his Possession; but as he was going away with it out of the House, *Firebrasse* and his Servants seized upon it, and took it from him. *Firebrasse*

Injunction
granted for
stay of Pro-
ceedings at
Law for force-
ably taking
from Defendant
Money, which
he had won of
the Plaintiff at
Play, tho' the
Defendant had
by Answer
denied all the
Circumstances
of Fraud charged
in the Bill.

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had

had brought an Information against *Brett* for Playing with false Dice; but *Brett* was acquitted: And *Brett* had brought an Action of Trespass against *Firebrasse* for taking from him in a forceable manner this Bagg of Guineas, and thereupon *Firebrasse* exhibited his Bill charging many Circumstances of Fraud and Circumvention, which were denied by the Defendant's Answer; and upon the Plaintiff's Motion the *Lord Chancellor* granted an Injunction 'till the Hearing of the Cause, and said, that he thought the Sum very Exorbitant for a Man to lose at Play in one Night, and that if it was in his Power he would prevent it; and cited the Case of *Sir Cecill Bishop* and *Sir John Staples*, in the *Lord Chief Justice Hales's* time, about a Wager upon a Foot-race, and that the *Chief Justice* in that Case said, that those great Wagers Proceeded from Avarice and were founded in Corruption.

Case 477.

*At the Rolls,
Master of the
Rolls.*

Rent incurred
in the Life-time
of a Testator,
tho' reserved
upon a Parol
Lease, shall be
paid before
Bond Debts,

Willett versus Earle.

UPON a Special Report, the Point in Question was, whether an Executor, who had paid the Arrears of Rent reserved upon a Parol Lease incurred in the Life-time of the Testator, had well paid and Administred this Money, so as to bar the Plaintiffs, who were Creditors by Bond.

The Court was of Opinion, that this Rent, tho' upon a Parol Lease, did partake of the Realty, and therefore to be preferred to Debts upon Bond; and that the Executor had well applyed and duly Administred the Assetts: And the Case of *Phillipps* and *Creech* was cited, where it was so adjudged in the *Common Pleas*, 32 Car. 2.

A T A B L E OF THE Principal Matters

Contained in the foregoing

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Abatement.

IN Case of Abatement, it is not necessary to revive against a Defendant that has not answered. 308

Though the Plaintiff abated her own Suit by Marriage, yet she had the Costs of the whole Suit, deducting only the Charge of the Bill of Revivor. 318

In a Bill of Interpleader, if the Trial at Law is directed between the Defendants, the Cause is ended as to the Plaintiff; and if he afterwards dies, the Defendants may proceed without reviving. 351

Where the Suit abates, the Plaintiff may bring a Bill of Revivor, or an original Bill at his Election. 363

A Decree for confirming an Agreement between the Lord of a Manor and his Tenants, for settling Heriots, and stinting the Common, revived by a Bill brought by the Purchaser of the Manor, who did not come in in Privy, and confirmed. 427

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If a Decree be signed and enrolled, an Assignee may revive by *Scire facias*. 283

A Purchaser, or Assignee cannot revive, either by *Scire facias*, or by Bill of Revivor; but may bring an original Bill to carry the former

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A Man shall not account for what he received as a menial Servant, and paid over to his Master. 136,

208. But *vide* 95

One of three Part-Owners of a Ship refuses to set out, or navigate the Ship; afterwards the Ship was lost in the Voyage, the Loss shall be born equally by all three; because he that refused might, notwithstanding, have had an Account of Profits. 297

A. settles an Equity of Redemption for a Jointure, and afterwards becomes a Bankrupt; the Assignees settle an Account with the Mortgagee, the Jointress shall be bound by this Account, unless she can shew particular Errors. 179

Account. Persons accountable, and Matters to be brought in to the Account.

An Infant shall have an Account of Profits against an Intruder; but where a Verdict has passed against his Title, he shall have no Account of Profits, until he has recovered at Law. 296

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A Sentence in a Court of Admiralty beyond Sea, will conclude the Parties here. 21

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An Accomptant shall be allowed Sums under 40 s. on his own Oath, but then in his Affidavit he must mention to whom paid, and for what and when. 283

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In what Cases a Man must make Oath of the Loss of a Deed, when he brings a Bill for Relief, or Discovery touching such Deed. 59, 180, 247, 310

A General Affidavit of having a material Witness is not sufficient for a new Commission; but the Witness must be named in the Affidavit, as also the Point to which he is to be examined. 234

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Agreement.

Where a Creditor agrees to accept a lesser Sum in Satisfaction of a greater, the Agreement ought to be precisely performed. 210

A. an Attorney being sick of the Sickness whereof he died, takes *B.* as his Clerk, and receives with him 120*l.* and by Articles agrees with the Father of *B.* to return 60*l.* of the Money, if *A.* died within the Year, *A.* died within three Weeks, the Executor of *A.* is decreed to pay back 100 Guineas. 460

A. agrees with *B.* Lord of a Manor to purchase a Copyhold for two Lives, such as *A.* shall name, *A.* pays 200*l.* Part of the Purchase Money, and was to pay the Rest in three Months; a Court is held, three Months pass *B.* died suddenly, and the Manor came to one who was not bound by this Contract. The Executors of *B.* decreed to refund the 200*l.* 472

Agreement obtained from young Heirs, and Securities taken for the Payment of great Sums of Money on the Death of their Ancestors, for Goods sold at extravagant Prices, set aside on Payment of the true value, which each Person respectively received, and though the Security was joint, yet one not to answer for what the other received. 467

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Agreement Parol by Feme, whilst sole, that if she died without Issue, she would leave her Heir at Law the Land, or 500*l.* Agreement decreed to be executed. 48

A. Father on a Treaty of Marriage of his Daughter, does by a Letter written to a third Person agree to give 1500*l.* Portion to his Daughter, and to charge it upon his Land; this, as 'tis a Writing signed by the Party, takes it out of the Statute of *Frauds and Perjuries*, and it being to charge Land, is properly suable in Equity. 110, 201

Bill for an Execution of a Parol Agreement for a Lease of an House to Plaintiff, who in Confidence of the Agreement, had laid out Money; Defendant pleads the Statute of *Frauds*; Plea allowed. 151

If on such Parol Agreement for a Lease any Consideration had been paid, Equity would restore the Consideration, though it did not execute the Agreement in Specie. 159

There is a Difference between Money laid out in necessary Repairs, and lasting Improvements; and Money laid out for Fancy and Humour; the former shall be allowed, though not the later. *Ibid.*

If there be a Parol Agreement for a Lease, and 'tis Part of the Agreement that the same shall be put into Writing; whether such Agreement be binding. *Ibid.*

Administratrix and her two Children intitled to a Lease of a House, agree by Parol to make a Lease to

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- A.* by Parol agrees with *B.* for a Lease; which is drawn and then perused and corrected by *A.*'s Counsel, and afterwards engrossed and executed by *B.* whether this is within the Statute of *Frauds*. 221
- Agreement in Writing may be discharged by Parol, notwithstanding the Statute of *Frauds*. 240
- A Man having made his Will and his Wife Executrix, the Son prevails on the Mother to get his Father to make a new Will, and that he might be named Executor, and promises to be a Trustee for his Mother. Trust decreed. 296
- A Parol Agreement for a Purchase and Possession delivered decreed to be performed against a subsequent Purchaser with Notice, who had a Conveyance and had paid his Money. 363
- A Settlement of a Jointure actually made, is an Evidence that all Parol Agreements before the Marriage, were actually resolved into that. 369
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- Bill for an Execution of an Agreement, it appearing by Proof that the Agreement was only to quit the Possession, and not extending to convey the Lands, the Bill was dismissed. 121
- Covenant to save harmless decreed in Specie, to wit, the Principal was decreed to indemnify the Surety. 189
- A Man covenants that Lands settled for a Jointure are 400 *l.* per *Ann.* the Jointure being deficient, the Heir decreed to make good the Covenant in Specie. 217
- Equity will not Decree an Execution of Articles, unless obtained fairly, without Surprize or Circumvention. 229
- A.* articles for the Purchase of *B.*'s Estate, pretending he bought it for one, whom *B.* was desirous to oblige, but in Truth bought it for another, and by that Means got the Estate at an Under-Value. Equity will not decree an Execution of these Articles. 227
- If an Heir sells a Reversion in the Life of his Father at an Under-Value, a Court of Equity will not in Favour of such a Purchaser decree the Heir specifically to perform a Covenant for further Assurance. 271
- A Man buys at an Under-Rate, and has a Covenant and collateral Security for quiet Enjoyment, the Land is evicted, the Purchaser shall recover back only the Consideration-Money, and not the full Value of the Land. 320
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tiff's Father would have been Tenant in Tail, if the Estate had been settled, and might have barred it. 480

Agreement. What shall be said a sufficient Performance, and what not.

A. agrees to surrender his Office to *B.* for 100*l.* for which *B.* gives Bond to *A.* *A.* surrenders, but *B.* is refused to be admitted. No Relief against this Bond. 98, 99

The Husband by Articles before Marriage, covenants to add 500*l.* to his Wife's Portion of 500*l.* and that it should be laid out in Land and settled on the Wife, and the Issue of the Marriage; the Husband, without the Trustees Consent, lays out the Money in a fine House and Garden; allowed a sufficient Performance of the Covenant. 345

Under-hand Agreement.

Under-hand Agreement to defeat an Agreement made on Marriage, set aside as fraudulent. 240

Upon a Treaty of Marriage between *A.* and the Daughter of *B.* *A.* being indebted 200*l.* by Bond, *B.* would not consent to the Match; to remove which Objection, the Brother of *A.* takes up *A.*'s Bond, and gives his own in the Room of it, and privately takes a Counter-Bond from his Brother to indemnify him; and the Daughter of *B.* is privy to this, and encourages it. *A.* dies, the Wife takes Administration, and was relieved against this Counter-Bond, tho' a Party to the Fraud. 348

A. himself might have been relieved against this Counter-Bond. *Ibid.*

Agreement on Marriage that the Mother should have the Portion set aside; and decreed the Portion to be paid to the Son. 346

The Brother adds 160*l.* to his Sister's Portion, to make it up the Sum desired, but takes Bond from her privately to repay it: The Husband and Wife both die, Bond is put in Suit by the Administrator of the Brother, against the Administrator of the Wife. Decreed to be delivered up as fraudulent. 475

Agreement on Marriage.

Settlement in Bar of all the Wife's Demands out of her Husband's personal Estate, by the Custom of the Province of *York* or otherwise, will bar the Wife of her distributive, as well as customary Part. 15

4000*l.* Portion is secured by Articles, wherein is a Proviso, that if the Husband did not within two Years settle a Jointure, he should only have the Interest for his Life: The Wife dies within the 2 Years, and before any Settlement made, the Husband not intitled to the Portion. 68

A. on the Marriage of his Son articles to settle a Jointure on the Wife and her Issue; but no Provision is made for the Son during his Life. The Father has the Portion, and the Wife dies without Issue. Whether the Son is entitled to any Estate in the Lands, 198

A. being indebted 700*l.* agrees on his Marriage to settle Lands of 100*l.* a Year on himself for Life, Remainder to his Wife for her Jointure,

B

Remainder

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- mainder in Tail upon their Issue. Decreed the Land to be sold to pay the 700*l.* and the Surplus of the Money to be laid out in a Purchase of Lands to be settled on the Wife and her Children; but this Decree was reversed on a Bill of Review, there being no Provision made for the Husband in the Lands to be purchased. 203
- A Settlement for a Jointure is made in Pursuance of Articles, wherein was a Covenant that the Jointure Lands were of such a Value; but this Covenant is omitted in the Settlement. The Covenant is subsisting. 218
- A Man articles, on the Marriage of his eldest Son, to settle Lands on the Son for Life, Remainder to the Wife for her Jointure, Remainder to the first and other Sons in Tail, Remainder to the right Heirs of the Son. The Father brings a Bill to be relieved against the Articles, alledging that he was surprized, and intended that upon Failure of Issue Male of his eldest Son, the Remainder should have been limited to his younger Son, charged with Portions for the Daughters, of the Marriage. Bill dismissed. 320
- Bill to have Jointure made up 400*l.* *per Ann.* according to a Parol Agreement on the Marriage: The Defendant pleads a Jointure made and accepted eighteen Years since; *per Cur'*, the jointure Deed is an Evidence, that all the precedent Treaties and Agreements were resolved into that. 369
- Tenant in Tail with Power to make a Jointure, covenants to make a Jointure, but dies before Execution without Issue; Remainder Man makes a Jointure to his Wife; Administratrix of the first Wife brings a Bill for an Account of the Profits agreed to be settled. Bill dismissed. 406
- A Man covenants with his intended Wife, that she should have Power to dispose of 300*l.* of her Estate; Whether the Covenant is discharged by the Marriage. 408
- Agreement on Marriage that 2000*l.* should be invested in Lands, and settled to the Use of the Husband and Wife, and their Issue, Remainder to the right Heirs of the Husband; provided that the Husband die without Issue, the Wife might elect within six Months, whether she would have the Land or the Money; the Husband dies leaving the Wife *enfeint* of a Daughter, which dies within the six Months, and the Wife is Administratrix to both; the Wife cannot elect, the Husband at the Time of his Death having Issue, though since dead: And the Money is bound by the Articles, and must be laid out for the Benefit of the Heir of the Husband, and shall not go to the Administratrix. 298, 299, 471
- In Consideration of a Marriage intended to be had betwixt two Copyholders, the Man surrenders his Copyhold to the Use of him and his intended Wife, and the Survivor of them, and the Woman in like Manner surrenders her Copyhold to the like Uses; the Man dies before any Marriage had; the Woman enters and enjoys for thirty Years. Declared a Trust, and a Resurrender and Account of Profits decreed. 433

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Agreement on Marriage to settle a Jointure in Consideration of 50*l.* Portion; the Husband dies before Portion paid, or Jointure settled; the Wife takes Administration to her Husband; *per Cur'*, she shall not have the Portion as Administratrix, and the Jointure also. 463
But *Quare*.

Money agreed on Marriage to be invested in Land, and settled, is not Assets at Law, being bound by the Articles. 471

Agreement voluntary.

A Bond voluntarily given after Marriage to settle a Jointure, decreed in Specie, because under Hand and Seal, though voluntary. 328

A voluntary Bond by the Husband after Marriage to settle a Jointure, which is settled accordingly; he dies and the Jointure is evicted; *per Cur'*, the Wife as Administratrix shall retain as much as her Dower fell short of the Value of her Jointure. 328

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Alimony. Vide **Baron and Feme**.

Answer.

A Man by Answer says, he believes and hopes to prove the Money paid: If the Cause is heard on Bill and Answer, it shall conclude the Plaintiff, and he must admit the Money paid. 140

There being but one Witness against what was sworn in the Defendant's Answer, the Plaintiff can have no Decree. 161

A *Few* ordered to be sworn to his Answer on the Pentateuch, and

the Plaintiff's Clerk to be present. 263

Defendant held to the Offer in his Answer tho' the Circumstances of the Case were varied from what they were at the Time of Answer put in. 448

Answer. As to the Caption and Taking of an Answer and Return.

Answer returned, and the Indorsement of *Executio istius brevis* omitted, supplied by other Words in the Return. 41

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Answer, sufficient and insufficient.

One Defendant's Answer is reported insufficient, and the Master's Report on Exceptions confirmed; afterwards the other Defendant puts in the like Answer. The Court for avoiding Delay, will judge of the Insufficiency of the Answer without sending it to a Master. 74

Where a Defendant pleads to Part, and answers to the Residue of the Bill, the Plaintiff cannot except to the Answer till the Plea is argued, or an Order obtained, that it shall stand for an Answer with Liberty to except. 344

The Defendant in his Answer says, that to his Remembrance he had received no other Sums than what are mentioned in his Answer; held a good Answer. 470

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An Appeal lies from the Court of Policies in *London*, to the Court of Chancery. 223

Upon a Prorogation the Party may proceed in the Account, notwithstanding an Appeal in Parliament. 344

After a Decree of Dismissal affirmed on an Appeal to the Lords, Bill is brought for a Discovery of a Deed, (said to be burnt pending the Suit) which made out the Plaintiff's Title, and the Bill is brought to the End that after such Discovery, the Plaintiff might apply to the House of Lords for Relief; on Demurrer the Defendant ordered to answer, but Plaintiff to proceed no farther without Leave of the Court. 416

Upon a Bill of Appeal from an inferior Court, the Appellant need not assign particular Errors, as he must upon a Bill of Review. 442

Bill of Appeal from inferior Courts must be upon the same Evidence, and there can be no Examinations *de novo*, no more than there may on a Bill of Review; but in the Spiritual Courts they allow new Evidence upon Appeals. 443

Appeals lie from the Court of Equity at *Lancaster* to the Dutchy Court. 443

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Assent and Consent. Vide Legacy.

The Consent of Counsel shall not conclude the Party. 273

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Plantations beyond Sea held Assets as to Creditors, though Estates of Inheritance. 93, 348

A Purchaser takes a Term in a Trustee's Name, and the Inheritance in his own; this Term, unless declared to attend the Inheritance, will be Assets in Equity. 188

But if he takes the Term in his own Name, and the Inheritance in the Name of a Trustee, the Term will be Assets at Law. 189

An Estate by *Occupancy* not Assets to pay Debts, before the Statute of *Frauds* and *Perjuries*. 234

Whether Money raised by the Heir by Sale of real Assets before Original filed, be Assets in Equity. 282

Whether the Trust of an Estate descended, be Assets in Equity. *ibid.*

Lands in *Ireland* shall be Assets to pay a Bond-Debt here; but otherwise of Lands in *Scotland*. 419

A Creditor having brought his Bill, and proved Assets, he shall have a Decree for his Debt, and not be sent to Law to recover it. 429

Money agreed on Marriage to be invested in Land, and settled in strict Settlement, is not Assets. 471

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A voluntary Payment by an Executor after a Bill in this Court, shall not be allowed. 369

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Judgment confessed by an Executor, pending a Bill here, not to be preferred in Payment, nor allowed on Account. 457

Arrears of Rent due from the Tenant by Lease-Parol, being in the Realty, ought to be paid before a Bond-Debt. 490

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Whether the Trust of a Fee-simple descended on the Heir, be Assets in Equity to pay a Bond. 172

An Equity of Redemption of a Mortgage for Years, is Assets in the Hands of the Heir to pay Bond-Debts. 410

Whether the Equity of Redemption of a Mortgage in Fee, shall be Assets to pay Bond-Debts or not 411

Plantations in Fee are Assets. 93, 348

Lands in *Ireland* Assets to pay a Bond here, otherwise of Lands in *Scotland*. 419

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Assignment and Assignee.

Assignee of a Term assigns it over; yet in Equity he shall be charged for the Rent, that incurred in his own Time. 165

An Assignee may revive a Decree by *Sci. fac.* if Decree be signed and inrolled; otherwise not. 283

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Attorney and Solicitor.

A Bill may be brought in Chancery for Solicitor's Fees only, if for Business done in that Court; and so it may, where the Business is done in another Court, if it relates to another Demand made in the Bill. 203

A Solicitor brought a Bill for his Fees. Defendant pleaded Stat. 3 *Fac.* and that the Plaintiff had not signed his Bill of Fees. Plea allowed. 312

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A Mortgage is devised to *A.* for Life; Remainder to *B.* in Fee, if the Mortgage is redeemed, the Money shall be paid unto them in Proportion to the Value of their Estates, *viz.* one Third to the Tenant for Life, and two Thirds to the Remainder Man. 70

A Man indebted by several Mortgages, Judgments, Bonds and simple Contract, C

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Contract, settles his Estate for Payment of his Debts. The real Securities shall be first paid, and then the Bonds and simple Contract Debts in an Average. 101

Settlement to pay 100*l.* per Ann. to the Heir, and afterwards to raise 100*l.* a-piece for younger Children, to be paid according to their Seniority; in Case of a Deficiency, they shall be all paid in Average. 335

A Man settles a Rent-charge on his Wife, and after by Will gives her Part of the Land; there shall be no Apportionment of the Rent. 347

Lands subject to a Mortgage are devised to *A.* for Life, Remainder to *B.* in Fee; *A.* redeems and dies; *per Cur'*, had *B.* come in the Life-time of *A.* he should have paid only two Thirds of the Money; but now the Executor of *A.* who enjoyed but for a Year, must make an Allowance only for the Time that *A.* enjoyed the Estate. 404

Where the Issue and Jointress claim by the same Settlement, if there be a Prior Incumbrance, the Jointress shall contribute and bear her Proportion, and not lay the whole Burthen on the Heir. 440

Authority and Power.

A Power to limit and appoint an Estate in Fee, may be executed at several Times, *viz.* at one Time to pass an Estate for Life, and an Estate in Fee at another. 85

A Person having only an Authority cannot annex a Power of Revocation to the Execution of it. 355

Award and Arbitrators.

An Award that Tenant for Life should pay to the Remainder Man 370*l.* for Waste supposed to be done, which was near the Value of his Estate for Life, and no Corruption being proved, the Award stood, notwithstanding the Party had made good the Repairs within 40*s.* before the Award made. 157

Where there appears a manifest Error in the Body of an Award, in some Cases there may be Relief against it in Equity: But where the Error does not appear without unrevelling of it, and examining to Matters of Account not relievable. 158

If *A.* and *B.* of the one Part, and *C.* of the other Part submit to Arbitration, the Arbitrators may make an Award, not only of Matters in Difference between *A.* and *B.* jointly, or *A.* and *B.* separately and *C.* but also of Matters between *A.* and *B.* only. 259

An Award made pursuant to an Order of Court, must be confirmed, as in the Case of a Master's Report; and either Side has a Liberty to except to it, and when so confirmed, the Cause may be set down for Hearing upon the Award. 470

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Equity will not compel a Man to discover what Goods he bought of a Bankrupt, after his Bankruptcy, and before the Commission sued out, where the Party had no Notice of the Bankruptcy. 27

A voluntary Payment to a Bankrupt not good, but if recovered in a Course of Law, it is otherwise. 94

Bill for an Account of Money received for one, who became a Bankrupt. Defendant pleaded, he received the Money as a menial Servant to the Bankrupt, and had accounted with him for it. Plea over-ruled. 95

Commission of Bankruptcy, superse- ded by the Consent of the petitioning Creditors, refused to be revived upon the Application of other Creditors, who had not come in under the Commission. 208

A Man buys Lands and has a Conveyance, and before Payment of his Purchase-Money becomes a Bankrupt; the Vendor shall not be put to come in as a Creditor for the Purchase-Money; but there is natural Equity without any special Agreement, that the Land shall stand charged with Payment of the Purchase Money, 267, 8

Barbadoes Island.

How a Plantation in the Island of *Barbadoes*, may be made liable to a Debt contracted in *England*. 460

A Plantation in *Barbadoes* is not a testamentary Estate by the Laws now in Force. 469

Baron and Feme. Estates and Interests of the Wife

A Feme possessed of a Trust of a Term marries; the Husband may dispose of it. 7

Otherwise if the Term is assigned in Trust for the Wife, with the Priv- ivity of the Husband. *ibid.*

But if it is assigned without the Hus- band's Privity, he may dispose of it. 18

Baron and Feme mortgage the Wife's Land, the Husband pays off Part of the Principal, and afterwards borrows the same Sum again upon the same Mortgage; the Heirs of the Wife shall not redeem with- out paying both Sums. 41

An Orphan being married dies under twenty-one; her orphanage Part shall go to her Husband, and not survive to the other Children. 88

Money in Trustees Hands for a Feme Covert shall go to her, if she sur- vives, and not to the Executors of the Husband. 161

Feme Mortgagee in Fee of a Copy- hold marries, and dies. Whether the Husband as Administrator to his Wife or the Heir, shall have the Benefit of the Mortgage, there being no Covenant to pay the Money. 170

A Jointress of Houses burnt down, joins with her Husband in a Fine *sur concess* for 99 Years, if she should live so long, for securing 1500*l.* to *J. S. J. S.* redemises to the Husband, reserving the E- quity of Redemption to him and his Heirs: The Husband lays out 3000*l.* in Rebuilding the Houses, and dies. Decreed the Wife, and not the Heir of the Husband, should redeem, she having a Reversion in her,

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her, which attracted the Redemption, and was no Party to the Redemption, by which the Equity of Redemption was reserved to the Husband. 214

Surplus of a personal Estate is given to *A.* and *B.* and the Wife of *B.* equally to be divided amongst them Share and Share alike. *B.* and his Wife, as being but one Person shall have only a Moiety. 233

Where a Legacy is given to a Feme Covert, Payment to her alone is not good. 261

A Sum of Money awarded to the Husband, which he is intitled to in Right of his Wife, will go to his Executor, and not survive to the Wife. 396

A Man may sue alone without his Wife for a Debt due to her by Bond: But if he joins his Wife in the Action, and recovers Judgment, and dies, the Judgment will survive to her. *ibid.*

A Widow before her second Marriage assigns over the greatest Part of her Estate for the Benefit of her Children by her first Husband: though this was done without the Consent of the second Husband; yet being to provide for the Children of the first Marriage, it was decreed to be good. 408

A Man before Marriage covenants with his intended Wife, that she should have Power to dispose of 300 *l.* of her Estate; whether this Covenant is discharged by the Marriage. 408

A voluntary Bond by the Husband after Marriage to make a Jointure on his Wife, he makes a Jointure, and the Wife gives up the Bond, the Jointure is evicted, the Widow (there being no other Debts) shall have her Jointure made good out

of the personal Estate, and the Giving up of the Bond by the Wife during her Coverture shall not bind her. 427

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The Husband's Executors are sued at Law for Goods bought by the Wife, whilst she lived separate, and had a separate Maintenance, which was known to the Tradesman who trusted her. Bill brought for Relief. Injunction denied, it being a proper Defence at Law. 71

Feme Covert parted from her Husband, wastes Goods, the bare Use whereof was devised to her for Life, Remainder over to a Stranger. The Husband shall answer the Value. 143

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How far the second Husband is liable to a *Deceitavit*, or Breach of Trust of the Wife and her first Husband. 309

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How far Equity will aid a Wife to recover an Annuity settled by her Husband for her separate Use after an Elopement, and an Offer of the Husband to cohabit with her. 53

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Alimony and separate Maintenance.

Upon a Bill to establish an Agreement for a separate Maintenance, the Husband is not bound to discover Acts of hard Usage towards his Wife. 204

The Husband settles Lands to the Use of himself for Life, Remainder to his Wife for Life; and farther agrees, that she should hold and enjoy the same, until his Heir or Executor should pay to her, or to her Executors, Administrators or Assigns 100 *l.* she dies in the Life-time of her Husband, and by a Writing in Nature of a Will, devises the 100 *l.* and held a good Appointment in Equity. 244

A Feme Covert saves Money out of her separate Maintenance; she may dispose of it as a Feme Sole. 245

A Woman living from her Husband, and having a separate Maintenance, contracts Debts: The Creditors by a Bill in Equity may follow the separate Maintenance, whilst it continues; but when that is determined, and her Husband dead, they cannot by a Bill charge her Jointure with those Debts. 326

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Bills of Peace to prevent Multiplicity of Suits are proper in Equity. 22, 266, 273

In what Cases a Man ought to make Oath of the Loss of a Deed; and in what not; upon a Bill brought touching such Deed. 59, 180, 247, 310

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If a Bill is in the Disjunctive, the Defendant by his Plea may take it either Way. 219

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A Bill in Equity lies to reverse Letters Patents obtained by Fraud. 277

It will not lie to compel a Lord of a Manor, to permit the Plaintiff to bring a Plaint in the Lord's Court; in Nature of a Writ of Error, to reverse an erroneous common Recovery suffered there. 367

A Bill may be brought for Solicitors Fees only, if for Business done in Chancery; and so it may where the Business is done in another Court, if it relates to another Demand made by the Plaintiff in his Bill. 203

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Equity will not oblige a Man to discover what Goods he bought of a Bankrupt after the Bankruptcy, and before the Commission sued out, where the Party had no Notice of the Bankruptcy. 27

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A Man is not bound to discover what may subject him to the Penalty of an Act of Parliament. 109

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No Discovery after a Verdict. 176

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Bill of Discovery will lie for a Matter that sounds in *Tort*. 308

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A Bill of Review lies not after a Demurrer allowed to a former Bill of Review. 135, 441

How a Bill of Review ought to be drawn up. 214, 216

Upon a Bill of Review the Party cannot assign for Error, that any of the Matters decreed are contrary to the Proofs in the Cause; but must shew some Error appearing in the Body of the Decree, or new Matter discovered since the Decree. 166

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No Limitation of Time for bringing a Bill of Review, yet after a long Acquiescence under a Decree, the Court will not reverse it, but upon very apparent Errors. 287

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What shall be reckon'd a sufficient *Lis pendens*, and what not. 286

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Possession of an House by a certain Day; *A.* conveys the House to a Creditor in Satisfaction of a real Debt; this shall not defeat the Plaintiff of the Benefit of the Decree. 459

Bond.

Debt by Bond charged on a Mortgage, though no special Agreement for that Purpose. 244

Equity in some Cases carries on the Debt beyond the Penalty; as when a Man is kept out of a Debt by an Injunction to stay Proceedings at Law. 350

But a Plaintiff in Equity cannot charge the Debt beyond the Penalty, any more than he can at Law. *Ibid.*

A Son differing with his Mother, settles his Mansion-House on his Brother, but first takes a Bond from him in his Sister's Name, that he should not permit his Mother to come into the House. Bond set aside as an unnatural Bond. 413

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Bonds for Marriage Brocage.
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Bottomry-Bonds.

A Man intending to go a Voyage, entered into a Bottomry-Bond, but the Ship not going the Voyage, but all along lying safe in the Port of *London*, the Court decreed the Defendant should lose the Premium, and accept of his Principal with usual Interest. 263

Charity, and Charitable Uses.

NO Agreement of the Parishioners, to whom a Charity is given, can alter it, or divert it to other Uses. 42

The Court refused to mitigate, or alter the Terms, on which a Lectureship for reading in Polemical, or Casuistical Divinity in *Cambridge*, was founded. 55

Consent of the Heir cannot alter the Charity given by his Ancestor. *ibid.*

A. by Will in 1676, gives 600 *l.* to Mr. *Baxter* to be distributed amongst sixty ejected Ministers. Upon an Information by the Attorney General, the Charity was decreed to be void, and the Money to be applied for the Maintenance of a Chaplain for *Chelsea College*: But this Decree was afterwards rever-

sed, and the 600 *l.* ordered to be distributed according to the Will. 248, 251

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Devise and Appointment to a Charitable Use.

Devise of 1000 *l.* to such Charity as the Testator had by Writing appointed, and no Writing being found, the King appointed the Charity. 224

A Devise for the Good of poor People, the Devise being indefinite, the King may appoint the Charity. 225

A Legacy for a Charity by the Civil Law, shall have Preference of all other Legacies. 230

If the Spiritual Court gives the Preference to charitable Legacies, tho' there is a Deficiency of Assets, yet the Court of Chancery will not grant an Injunction. *ibid.*

Misapplication of a Charity.

Several Charities devised to one Parish, *viz.* 5 *l.* per Ann. for the Church, 10 *l.* for the Poor, and ten Pounds per Ann. for Highways, applied promiscuously, sometimes all to the Church, sometimes all to the Poor, held to be a Misapplication. 42

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Common.

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A Common that has been inclosed for thirty Years, shall not afterwards be thrown open. 32

If a Commoner brings an Action against *A. B.* for oppressing the Common, or using it where he ought not, and recovers 1 s. or other small Sum for Damages, and afterwards another Commoner brings the like Action against *A. B.* he may bring a Bill that the Plaintiff in such Action may accept the like Damages. 308, 9

An Inclosure made twenty Years since, and a Feme Covert having a Right to Common there, her Husband during his Life-time agreed to the Inclosure; and it appearing to be for the Improvement of the Wife's Estate; and that she intended to make an unreasonable Advantage to her self; The Court decreed the Inclosure should stand. 456

Composition. Vide *Debts.*

Condition.

A Man devises 800 l. Portion to his Daughter; provided she marry with Consent of *J. S.* this is only *in terrorem*, not being limited over. 20

Portions are given by Will to three Daughters; upon condition they release certain Lands to the Heir; one dies without releasing. Whether the Portions of the other Daughters shall be paid. 222

One devised Lands called *A.* to *J. S.*

but if he should not enjoy those, then he should have other Lands called *B.* and *J. S.* being evicted of a Moiety of *A.* by a Stranger, Decreed he should only have a Satisfaction *pro tanto* out of *B.* 270

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A Farmer of the Excise having an Estate of his own sufficient to satisfy what he owed the King, takes out an Extent in Aid, against a Person who owed him Money and had failed. He was decreed to refund with Costs; and declared *per Cur'*, that where an Accountant to the King had sufficient of his own to satisfy the King's Debt; he ought not to take out an Extent in Aid of the King's Debt. 469

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The Wife joins with her Husband in a Mortgage, and levies a Fine, the Husband agreeing that the Wife should have the Equity of Redemption in lieu of her Dower; afterwards he makes a second Mortgage of the Estate: The Agreement is fraudulent and void as to the second Mortgagee; yet the Court decreed the Wife, if she survived her Husband, should have her Dower notwithstanding the Fine. 294

A Widow before her second Marriage assigns over the greatest Part of her Estate, for the Benefit of her Children by her first Husband, though this was done without the Consent of the second Husband; yet being to provide for the Children of the first Marriage, it was decreed to be good. 408

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Rent-charge in Fee granted out of Gavelkind Land, shall follow the Nature of the Land, and descend in Gavelkind. 489

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Guest.

In an Account no Allowance for Diet, where the Party comes as a Guest upon Invitation. 19

Heir and Ancestor.

GOODS are devised to *A.* for Life, and after his Death to the Heir of *B.* *B.* dies in the Life of *A.* he that was Heir of *B.* at his Death, and not he, who was his Heir at *A.*'s Death, shall have the Goods. 35

Heres factus, or a Devisee shall have the personal Estate applied in Ease of the Real. 36

If in a Bill against the Heir for Satisfaction of a Bond-Debt out of Assets, it is not alledged the Heir was bound: It is a good Cause of Demurrer. 180

A Sum of Money secured by Mortgage, is given by Will to younger Children, who are Infants, and for the more sure Payment of it, the Estate of the eldest Son is charged with this Money: The Mortgagor during the Minority of the Infants, brings a Bill to redeem his Estate, and pursuant to a Decree, pays in his Money to a Master, who puts it out upon a Security, which proves bad. The

Estate of the eldest Son shall not make it good. 336

If Lands of an Heir are charged with Portions to Infants at 21, or Marriage, the Heir in Ease of his Land, shall not be admitted to pay in the Portions before they are due. 338

After a Verdict obtained against the Heir, in an Action brought upon the Bond of his Ancestor, and before the Day in Bank, the Heir dies, and devises the Lands to *J.* *S.* the Plaintiff in the Action brings a Bill to affect the Lands in the Hands of the Devisee with this Debt. Bill dismissed. 400

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A Man purchases an Equity of Redemption, and dies, the Mortgage shall not be paid out of the personal Estate for the Benefit of the Heir; it not being the Ancestor's Debt. 37

Baron and Feme mortgage the Wife's Land; the Husband pays in Part of the Principal, and afterwards borrows the same Sum again: the Heir of the Wife shall not redeem without paying both Sums. 41

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- If a Term is settled in Trust for a Man and his Heirs, it shall go to his Executors. 164
- A Feme Mortgagee in Fee of a Copyhold, marries and dies: Whether the Husband as Administrator to his Wife, or the Heir shall have the Benefit of the Mortgage, there being no Covenant to pay the Money. 170
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- A Mortgagee in Fee being in Possession, sells the Estate as absolute Owner. As between the Heir and Executor of the Purchaser, it shall be considered as a real Estate, and go to the Heir. 271
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An Infant may be a Trustee. 343

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Privilege and Favour towards an Infant, in what Cases, and what not.

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An Infant shall not be fore-closed, without having a Day to shew Cause when he comes of Age: But the proper Way is to decree

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An Infant shall have an Account of Profits against an Intruder, as against a Guardian; but where there is a Verdict against the Infant's Title, he can have no Account of Profits, till he has recovered at Law. *ibid.*

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Injunction.

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 The Jurisdiction of Chancery, even of the Latin Side not subjected unto, nor to be controlled by the King's Bench. 131
 The Chancellor's Court in *Oxford* hath no Jurisdiction touching Matters of Freehold. 212
 The Court of Chancery has a natural Jurisdiction in the Case of Forgery. 292

Laches.

ONE *Huckstep* by Will devises Lands to be sold, and there is a Direction in the Will, that if any of the Name of *Huckstep* would purchase them for his own Use, the Trustees should sell to him for 200*l.* less than the reasonable Value. One of the Testator's Name, twenty-five Years after his Death, brings a Bill for this Preemption. Bill dismissed. 362

Lease and Covenants therein.

Lessee, where there is a Covenant by him to repair, makes an Underlease to *J. S.* who is in Possession: Under-lessee not liable to the

Covenant in Law; nor in Equity, unless the first Lessee is insolvent. But *Quare* if then liable. 87

Legacies and Legatees.

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10000*l.* left by Will to procure a Dukedom to the Head of a Family. 5
 If the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition shall go. 93
 Charitable Legacies by the Civil Law, are to be preferred to other Legacies. 230
 A Legacy not within the Statute of Limitations. 256
 Where a Legacy is given to a Feme Covert, Payment to her alone is not good. 261
 Where a Legacy is payable at a certain Day, it shall carry Interest from that Time, if not paid. 262

Legacies, or Portions vested or lapsed.

Legacy given to an Infant to put him out Apprentice, and he dies before he is of a competent Age to be put out; it shall go to his Executor. 255
 Where a Legacy is *Debitum in presenti*, though not payable till a future Day, it shall go to the Executor or Administrator of the Legatee, if he dies before the Day of Payment. 324
 And so it shall, if a Sum of Money is devised to be paid out of Land; for

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for it is considered only as a Legacy. 324

A. devises his personal Estate to *B.* in Trust for his Son and the Heirs of his Body, and if he died during his Minority, and without Issue, then to *C.* and makes his Son Executor, and *B.* Executor in Trust for the Son during his Minority; the Son attains eighteen, and dies. This personal Estate shall go to the Executor of the Son, and not to *C.* the Estate vesting in the Son at seventeen, for *Minority* in this Case must be understood to determine at the Time, when the Executorship of *B.* determined, which was when the Son attained 17. 326

A Man by a Settlement makes a Provision for raising 100 *l.* a-piece for his younger Children, to be paid according to their Seniority, and a Maintenance in the mean Time; some of the Children die in the Life-time of their Father; their Portions shall not be raised in Favour of their Administrators; for no certain Time being appointed for Payment of the Portions, they did not naturally attach till the Death of the Father. 335

Otherwise if any of the Daughters had married, and died in the Life of their Father. *Ibid.*

A Portion devised to a Child with Interest, but not to be paid or payable until the Child attain 21, or was married; the Child dies under 21, and unmarried. Decreed the Portion to be paid to the Administrator of the Child. 462

Abatement and Refunding.

In Case of Deficiency of Assets, a specifick Legatee shall not abate in Proportion with pecuniary Legatees. 31

But one pecuniary Legatee shall abate in Proportion with the Rest, though his Legacy is directed to be paid in the first Place. *Ibid.*

A Creditor shall compel a Legatee to refund, and so shall one Legatee another, where Assets are deficient. 94, 162

Whether an Executor, after he has voluntarily assented to a Legacy, can compel the Legatee to refund. 94

Difference between a voluntary Assent to a Legacy, and an Assent by Compulsion. *ibid.*

Lands devised for Payment of Debts and Legacies; the Debts and Legacies shall be paid *pari passu*, but that Decree reversed *per Lord North*, who gave Preference to the Debts; but Lord *Jefferies* dissatisfied with this Reversal. 482

Surplus, and Residuary Legatees.

A. devises the Surplus of his Estate to his two Nephews, equally to be divided, and appoints his Executor to lay it out for the Benefit of his said two Nephews, one of the Nephews dies in the Testator's Lifetime. The surviving Nephew shall have the whole Surplus: The later Words, whereby the Whole is appointed to be laid out for the Be-

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nefit of the Nephews being joint, and no Benefit intended for the Executor. 425

A. gives 800 *l.* to his Executor, in Trust to pay Annuities to *B.* and *C.* for their Lives, exceeding the Interest of the 800 *l.* and gives the Surplus of his Estate to *D.* The Annuitants being dead, the 800 *l.* shall go to the Residuary Legatee, and not to the Executors. *ibid.*

Assent to a Legacy.

A small Matter will amount to an Assent to a Legacy, it being a rightful Act. 94

Assent to a Legacy, or voluntary Release by an Executor, shall not bind a Creditor. 455

Ademption of a Legacy.

A. by Will gives 400 *l.* to be laid out in finishing an House, *C.* lives to lay out as much himself, but leaves the House unfinished: The 400 *l.* shall not be laid out. 95

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Limitation. Vide Condition.

Statute of Limitations.

The Statute of Limitations attaches a Demand pending a Bill in Equity; and though the Bill is dismissed by Reason the Matter is proper at Law; yet the Court will not suffer the Statute to be pleaded at Law. 73

A Legacy not within the Statute of Limitations. 256

Statute of Limitations is no Plea in Bar to an open Account. 456

Lis Pendens. Vide under Title Bill.

London.

The Custom of *London* shall not prevent the Attendance of a Term on the Inheritance. 2

A Citizen having made a Settlement upon his Wife in Marriage, in lieu of her customary Share, and having one Son and two Daughters, devises two Thirds of his whole Estate to his Daughters, and one Third to his Son. How it shall be divided. 6

Sums of Money given by a Freeman to a Daughter, if not given as a Marriage-Portion, or in Pursuance of a Marriage-Agreement, no Advancement; but however shall be brought into Hotchpot. 61, 89, 90

Chymical Receipts to be reckoned no Part of a Freeman's personal Estate. 63

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- An Orphan being married dies under 21, her orphanage Part shall go to her Husband, and not survive to the other Children. 88
- Any Provision made by a Father for a Child, is an Advancement within the Custom, unless the Father by Writing declare the Contrary: And for some Time held, that in such Writing the Sum must be mentioned, because of bringing it into Hotchpot. 89
- A Freeman of *London* having a Term in his own Name, purchases the Inheritance in the Name of a Trustee, and there is no Declaration, that the Term shall attend the Inheritance. This Term shall attend the Inheritance, and not be subject to the Custom. 104
- The testamentary Part of a personal Estate of a Freeman of *London* dying intestate, held upon arguing a Plea, not to be distributable by the Statute of Distributions. 133
- But decreed *contra* in the Case of a Person dying intestate within the Province of *York*. 134
- A Freeman leaves *London*, and lives twenty Years in the Country, then marries and makes his Wife a Jointure, and dies; the Wife shall have her customary Share of the Husband's personal Estate. 180
- A Freeman having two Daughters his Coheirs, settles Lands of Inheritance on one of them in Marriage: The Question was, if this Settlement was an Advancement within the Custom. 181
- Admitted that in the Case of a Son and Heir it would not be an Advancement. *ibid.*
- The Custom certified, that a Settlement of a real Estate was no Advancement, either of an Heir or Coheir, though the Father should afterwards declare the same to be a full Advancement. 216
- A Freeman advances a Child in Marriage with a Portion; such Child is barred of the orphanage Part, unless the Certainty of such Portion appears by Writing under the Father's Hand. *ibid.*
- Money brought into *Hotchpot* by an Orphan, shall be brought into the orphanage Part only. 345
- Money given by a Freeman of *London*, to be laid out in Land, and settled on his eldest Son for Life, Remainder to his first and other Sons in Tail, shall not be reckoned any Part of his Advancement, and be brought into *Hotchpot*. *ibid.*
- A Daughter of a Freeman of *London* marrying without her Father's Consent, loses her orphanage Part of his personal Estate, unless he is reconciled to her before his Death. 354
- Grandchildren of a Freeman are not intitled to a Share of his personal Estate by the Custom of *London*. 397
- By the Custom of *London*, if a Surety in a Bond is sued alone, he shall make his Co-sureties contribute. 456
- So by the Custom, where a Surety in a Bond pays the Debt, though he has no Counter-bond; yet he may maintain an Action against the Principal. *ibid.*
- The Wife of a Freeman, who dies intestate, where there is no Child, is intitled to one Moiety by the Custom, and to a Moiety of the remaining Moiety by the Statute of Distributions. 465

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Lord and Tenant. Vide *Manor*.

Lunatick. Vide *Ideot*.

Manor.

A Decree for confirming an Agreement betwixt the Lord of a Manor and his Tenants, for settling Heriots, and stinting the Common, revived by a Bill brought by the Purchaser of the Manor, and confirmed, tho' the Lord and his Tenants were only Tenants for Life. 427
But *Quere*.

Marriage.

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If a Daughter of a Freeman of *London* marries without her Father's Consent, she loses her orphanage Share of his personal Estate, unless he is reconciled to her before his Death. 354

Marriage Brocade Bond decreed to be delivered up, the Marriage being had without the Consent of the Woman's Parents. 412

A. and *B.* being about to marry, surrender their respective Copyhold Estates to the Use of them two, and the Survivor: The Man dies before the Marriage; the Woman enters upon the Land, and after thirty Years quiet Enjoyment, she is decreed to surrender to the

Heir, and account for the Profits. 433

Restraints on Marriage.

A Legacy given to a Feme on Condition she marry with the Consent of *J. S.* is only in *Terrorem*, if not given over. 20

Master and Servant.

Bill for an Account of Money received for one, who became a Bankrupt. Defendant pleads, he received the Money as a menial Servant to the Bankrupt, and had accounted for it to him. Plea overruled. 95

A Servant shall not account for what he received, and paid over to his Master, or to his Order. 136, 208

A. an Attorney during the Sickness whereof he died, takes *B.* as his Clerk, and receives with him 120 *l.* and by Articles agrees with the Father to return 60 *l.* of the Money, if *A.* died within a Year; *A.* died within three Weeks, the Executor of *A.* is decreed to pay back 100 Guineas. 460

Merger.

The Lord of a Manor, where by the Custom he has the Cut of the Woods growing on the Lands, grants all the Woods and Underwoods growing, and to grow on the Copyhold, to the Copyholder and his Heirs; this shall not merge in the Copyhold. 21

Messen-

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Messenger.

A Messenger awarded on a *Capi Cor-
pus* returned, by the Sheriffs of
London. 116, 154

A Messenger is but a new Officer,
and subordinate to the *Serjeant* at
Arms. 344

Monopoly. Vide under Title
Trade.

Mortgage.

As touching the Buying in of
Incumbrances, and what Use
may be made thereof. Vide
Title Securities.

A Man purchases an Equity of Re-
demption, and dies, the Mortgage
shall not be paid out of the perso-
nal Estate, for the Benefit of the
Heir; it not being the Debt of the
Ancestor. 37

Tenant in Tail of an Equity of Re-
demption may devise it for Pay-
ment of Debts. 41

A Mortgage made by the Testator
subsequent to his Will, shall be
only a Revocation *pro tanto*, and
so it is after a Settlement with
Power of Revocation. 97, 141,
182

A Mortgagee in Fee being in Posses-
sion, sells the Estate as absolute
Owner. As between the Heir and
Executor of the Purchaser, it shall
be considered as a Real Estate, and
go to the Heir. 271

A Mortgage subsequent to a Will,
is a Revocation in Law, but not a
total Revocation in Equity. 329

*Special Agreements about Mortgages,
and Redemptions special.*

A Mortgage is made redeemable on-
ly during the Life of the Mort-
gagor. Decreed his Heir should
redeem. 7

But this Decree was afterwards re-
versed upon a Bill of Review.

214, 232
Provido in a Mortgage, that the
Mortgagor, or the Heirs Male of
his Body might redeem, the As-
signee may redeem. 33

Mortgage made in 1673, in which is
a special Clause of Redemption,
viz. that if the Mortgagor or the
Heirs Male of his Body, should in
June 1686, pay the principal Sum
and Interest in the mean Time;
then the Mortgagor, or the Heirs
Male of his Body might re-enter.
The Wife of the Mortgagor, who
had a Jointure of Part of the
Lands, decreed to redeem. 190

A. mortgages to B. his Brother,
and agrees, if he has no Issue Male,
that his Brother shall have the
Land; such an Agreement may be
decreed in Equity. 193, 4

Mother Tenant for Life, Remain-
der in Fee to her Son, they con-
vey Lands to B. in Fee, who is
put into Possession; but under an
Agreement, that if the Money be
repaid in ten Years, B. shall re-
convey. The Son without the
Mother brings a Bill to redeem;
the Profits much exceed the Inte-
rest. Decreed B. to account for
the Profits, and not permitted to
set the Profits against the Interest.

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In Case of a *Welsh* Mortgage, where a Mortgagee is put into Possession, and the Conveyance to be void on Payment of the Mortgage-Money, though the Agreement be to retain the Profits against the Interest; yet if the Value be excessive, the Court will decree an Account, even of the mean Profits, notwithstanding the Agreement for retaining the Profits in lieu of Interest.

477

Mortgage, Redemption, Forecloser.

As touching Redemption of Lands extended upon a Judgment; Vide Judgment, &c. under Title Securities.

Equity of Redemption of a Mortgage for Years, or in Fee, Assets to pay Bond-Debts. Vide Assets.

A Mortgage is made redeemable only during the Life of the Mortgagor; yet the Mortgagor may be foreclosed in his own Life-time.

8

Once a Mortgage and always a Mortgage. *ibid.*

Two Mortgages; one worth redeeming, the other not; the Heir shall not redeem the one without the other.

29, 245

Baron and Feme mortgage the Wife's Land; the Husband pays off Part of the Principal, and afterwards borrows the same Sum again upon the same Mortgage. The Heir of the Wife shall not redeem without paying both Sums.

41

A Fine levied by a Mortgagee; and five Years Non-claim will not bar the Mortgagor of his Equity of Redemption.

132

Mortgagee forecloses, and then agrees with the Creditors, who were Parties to the Suit, to convey to them on Payment of his Money in twelve Months. Redemption decreed to the Creditors after twenty Years Possession, and great Improvements made.

138

He that comes to redeem a Mortgage must shew, he has a Title to the Equity of Redemption.

182

A Mortgagor admitted to redeem before the Day of Payment.

183,

394

If Part of a Mortgage be within a Jointure, that gives the Jointress a Title to redeem the Whole.

190

Restrictions of Redemptions in Mortgages, discountenanced in Equity.

191

An Estate cannot at one Time be a Mortgage, and afterwards become an absolute Purchase, by one and the same Deed.

192, 215

A Mortgage cannot be a Mortgage of one Side only.

ibid.

One that claims under a voluntary Conveyance may redeem a Mortgage.

193

An Annuity is granted out of Land with a Clause of Entry, and Detainer till Payment, and made redeemable on Payment of a Sum of Money: The Grantor cannot be foreclosed of the Land, tho' he may of the Annuity.

209

Mortgagee lends more Money to the Mortgagor on Bond; the Mortgagor shall not redeem without paying the Bond-Debt, as well as the Mortgage-Debt.

244

Nor

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Nor shall the Heir of the Mortgagor redeem without paying both Debts. 245

If there are two Mortgages, and one is defective, if the Heir will redeem, he must take both. *ibid.*

What Circumstances may induce a Court of Equity, to make an absolute Conveyance redeemable. 268

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Where a Man owes Money on Mortgage, and Money on Account to *J. S.* and makes a general Payment, it shall be applied in Satisfaction of the Mortgage, because *that* Debt carries Interest. 24

A Debt is owing upon Bond with Sureties, and another Debt by simple Contract; afterwards an Account is stated of what is due for both Debts, and one Balance drawn, and a Bill of Sale is made for securing the Balance, which proves deficient; the Money received on the Bill of Sale shall be applied towards Satisfaction of both Debts in Proportion. 34

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But Prohibition lies at the Suit of the King, though the Defendant has pleaded. *ibid.*

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Proportion.

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A Debt is owing by Bond with Sureties, and another Debt on simple

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There are three Part-owners of a Ship, and one refusing to navigate the Ship, the other two do it against his Consent, and the Ship is lost in the Voyage: He shall bear his Proportion of the Loss; for he would have been intitled to a Share of the Profits, if there had been any. 297

A. on his Marriage agrees to settle particular Lands on his Wife and their Issue, and afterwards sells Part of the Lands; Jointress decreed to have the Deficiency of her Jointure made good out of the Inheritance of the Lands remaining unfold; but that Decree reversed, for it would be an Hardship on the Issue, to make them bear the whole Loss, who ought only to bear a Proportion. 440

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A. devises the Surplus of his Estate to his two Nephews equally to be divided betwixt them, and appoints his Executor to lay it out for the Benefit of his said Nephews; one of the Nephews died in the Testator's Life-time: The surviving Nephew shall have the Whole, the later Words, by which the Surplus is appointed to be laid out for the Benefit of the Nephews, being joint. 425

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Land is devised to pay Debts and Legacies out of Rents and Profits; the Land may be sold: Otherwise if out of annual Rents and Profits: But if such Trust be by Deed, the Land cannot be sold in either Case. 104

A. obtains a Decree for 2700*l.* against B. who appeals to the House of Lords, where the Decree is affirmed; and B. on Petition obtains an Order for Rehearing; and immediately falling ill makes his Will, and devises his Land for the Payment of his Debts. Decreed

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142

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Debts arising by a Mifeazance, as for an Escape or Breach of Trust, or contracted *mala fide*, not within a general Provision for Payment of Debts.

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